

## State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation

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# STATE CONSTITUTIONAL AMENDING, INDEPENDENT INTERPRETATION, AND POLITICAL CULTURE: A CASE STUDY IN CONSTITUTIONAL STAGNATION

*Lawrence Schlam\**

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\* Professor of Law, Northern Illinois University College of Law. I wish to thank Professors Ann Lousin, Janice C. May, and Robert F. Williams for their helpful comments, and the students in my State Constitutional Law Seminars for their valuable insights over the years. Research on the Illinois amendment provisions was funded, in part, with a grant from the Illinois Bar Foundation, and was conducted, in part, by Diane R. Klock, J.D. (1985). This article is dedicated to the memory of Professor Irving Younger. It will eventually appear in somewhat modified form in, LAWRENCE SCHLAM, *STATE CONSTITUTIONAL AMENDMENT AND INTERPRETATION IN THE AMERICAN SYSTEM* (forthcoming 1994) (Austin & Winfield, publishers).

The power to amend the constitution is a fundamental political power; it is the essence of sovereignty.<sup>1</sup>

## INTRODUCTION

Illinois's state constitutional individual rights law, at least in recent times, has undergone relatively little expansion or growth. This research began as an attempt to understand why this is so<sup>2</sup> and whether it is, for some reason, appropriate or not. In the process, however, it became evident that the Illinois experience may usefully serve to demonstrate why most states, at least in the modern era, have not experienced growth in individual rights jurisprudence under their respective state constitutions. In fact, it may be that most states, for similar legitimate reasons, will never participate to any great extent in what has come to be called the "new judicial federalism."<sup>3</sup>

This is because a close correlation seems to exist between the ease or difficulty with which a state constitution can be amended, and the onset and growth of independent — and usually expansive<sup>4</sup> — state

1. JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 261 (London, Clowes & Sons 1885).

2. Some time ago, while engaged in conversation at a conference on state constitutionalism and the "new federalism," a colleague of mine casually remarked to one of those in the group who was writing a book on his state's constitution: "I'll bet a book on Illinois state constitutional law might be interesting and useful." "Yes," the author said, "and easy to write too, at only three pages." The element of truth in such hyperbole was amusing then, and even today that casual remark remains a trenchant insight into the limited development of independent state constitutional law in Illinois with regard to the protection of individual rights.

3. For a definition and discussion of the "new judicial federalism," see *infra* notes 69-72 and accompanying text.

4. Several commentators have suggested that there are sound reasons for initially engaging in state constitutional interpretation independent of the federal law. See, e.g., *People ex rel. Daley v. Joyce*, 533 N.E.2d 873, 880 (Ill. 1988) (Clark, J., concurring); Ronald K.L. Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 14-15 (1981) [hereinafter Collins, *Reliance*]; Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 383, 392 (1980) [hereinafter Linde, *First Things First*]; Note, *Developments — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1362-64 (1982) [hereinafter Note, *Developments*]. Independent interpretation occasionally results in opinions which are not expansive of rights. See, e.g., *State v. Florence*, 527 P.2d 1202 (Or. 1974) (accepting the rule in federal cases regarding custodial searches under the Oregon Constitution); see also *State v. Smith*, 725 P.2d 844 (Or. 1986) (finding that the Oregon Constitution does not require *Miranda*-style warnings before interrogation); *State v. Roth*, 471 A.2d 270, 375 (N.J. 1984) (holding that a state double jeopardy provision provided less protection than the federal provision, so the court applied the federal rule); *State v. Sparklin*, 672 P.2d 1182, 1184 (Or. 1983) (declaring that the benefit of a "single [*Miranda*] test exceeds any gain from improving that test"); *State v. Bolt*, 689 P.2d 519, 527 (1984) (expressing a similar concern); John Gruhl, *State Supreme Courts and the U.S. Supreme Court's Post-Miranda Rulings*, 72 J. CRIM. L. & CRIMINOLOGY 886 (1981) (discussing whether state courts may have helped to dimin-

constitutional interpretation by state courts. More important, conservative approaches toward interpretation seem to correlate closely with state constitutional inflexibility (and probably *should* do so) when these conditions reflect a negative popular will on the issue of fundamental constitutional change, which is itself a bias in response to contemporaneous political culture in a given state.<sup>5</sup>

For example, in the name of political peace and economic stability, the citizens of Illinois have traditionally limited their capacity to effectuate fundamental change in their scheme of government by enacting numerous, often unnecessary restrictions on the constitutional amendment process. The result of this tradition, *inter alia*, is an inflexible judicial article in the state constitution with regard to antiquated methods of judicial selection, which leads to a significant lack of judicial independence and a corollary diminution in the historic development of individual rights protection under state constitutions. The reason for this is that in Illinois, as in many states, the local political culture is disunified, individualistic, and often factional. Since this tenuous state of affairs cautions against allowing for fundamental change through "simple majorities,"<sup>6</sup> the popular inclination in these states has been to make difficult the process of constitutional amendment. Reflecting this popular caution and being familiar, of course, with these local self-imposed limits on constitutional revision,<sup>7</sup> state courts apparently feel justified in providing little if any compensatory protection for individual rights, especially if

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ish the rights of defendants to a degree greater than the Burger Court).

Nevertheless, it would hardly seem worthwhile for a state court to forego easy reliance on federally-mandated requirements when evaluating challenged state action. Doing so risks either reversal or being brought to account politically for providing potentially unpopular state constitutional protection for criminal offenders. Thus, expansive interpretation would seem unwise unless the judge was convinced that a level of protection greater than the federal minimum was clearly required and was acceptable to the public and the judge's fellow partisans. Otherwise, the greater percentage lies in obscuring judgments on individual rights behind the argot and requirements of federal constitutional law. See, e.g., Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1364-65 (1986) (arguing that the doctrine "permits state courts to hide behind federal law to frustrate their accountability and it forbids federal lawmaking through federal court review to enhance the role of the state polity to oversee its own courts").

5. It is assumed that, by definition, constitutional change is "fundamental" change, even though some potential changes in a constitution would not be regarded by most citizens as *relatively* fundamental.

6. See, e.g., *infra* notes 146-47 and accompanying text (discussing the politics of fear of change).

7. See *infra* notes 63-64 and accompanying text (discussing state court familiarity with common law and traditions of state).

doing so could be viewed as a "nonformal" amendment to a constitution which the framers ("the people") intended to see amended only infrequently.

This article suggests that popularly imposed limitations on constitutional amendment or revision amount to an appropriate political compromise under certain historical and demographic circumstances. In fact, a tradition of constitutional inflexibility in response to a divisive local political culture should serve presumptively as a principled basis for conservatism on the part of state courts in the face of demands for expansive construction of state bills of rights. The study of the legal history of constitutional amendment in a particular state, here Illinois, not only illuminates the political culture responsible for a given degree of constitutional flexibility in that state, but appears to provide an explanation for the extent of state judicial independence and the degree of expansive constitutional interpretation found in that state as well. A state court's approach toward the interpretation of its individual rights provisions, in other words, is defensible because it maintains democratic accountability when consistent with the sovereign will. That sovereign will, in the form of a popular attitude toward constitutional change within the state, is explicitly manifested in the relative rigidity of the amending provisions; and state judges are especially inclined to comply with the popular will if a rigid constitution makes reform of judicial selection, and thus judicial independence, seemingly impossible. It is one thing to continually argue, as has been the case in recent years,<sup>8</sup> that state courts have the general power to participate in the "new judicial federalism"; it is another to explain to a given state court why it *should* exercise that power. It may be, under some circumstances, that it should not.

Part I of the article reflects on the distinctiveness of state constitutions and how this relates to the interpretation of those documents. Part I then articulates the present view of what is likely to encourage independent, expansive state constitutional interpretation (that is, the "new judicial federalism"). Part II suggests the specific "mix" of local political characteristics that might be expected to re-

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8. *E.g.*, *People v. Diguila*, 576 N.E.2d 126 (Ill. 1990) (*amicus curie* brief from the Illinois State Bar Association); Phyllis S. Bamberger, *Methodology for Raising State Constitutional Issues*, in RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 287 (1985); Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635 (1987); Robert F. Utter, *Advancing State Constitutions in Court*, TRIAL MAG., October, 1991, at 41 [hereinafter Utter, *Advancing State Constitutions*].

sult in, or account for, the lack of independent interpretation in any given state. Part II then proposes the legal history of state constitutional "self-amendment"<sup>9</sup> as a body of material most reflective of and responsive to this "mix" (which includes the evolving political culture<sup>10</sup> of a state) and thus *indicative* of the popular attitude toward constitutional change in that state. Part II also points out that constitutional inflexibility inhibits judicial independence by conveying a negative popular attitude toward change, thus provoking conservative constitutional interpretation by state courts.

Part III focuses on Illinois as a state in which to profitably explore the interrelationship between independent interpretation, constitutional flexibility, and local political culture; it is one of the few states with an often-noted record of unusually limited use of independent judicial analysis. Part III relates in a general fashion: (1) the origins and nature of Illinois's political culture; (2) the related traditional inflexibility of Illinois's state constitution as compared to state constitutions nationally; and (3) the historical lack of judicial independence in Illinois which has followed from such inflexibility — all of which have contributed to and are politically consistent with Illinois's present, narrow "lock-step" approach to constitutional analysis in the area of individual rights.

Part IV presents the legal history of Illinois constitutional conventions in the context of the historical development in Illinois of a dis-unified and individualistic political culture. It discusses the scholarship concerning that culture and the restrictions on amending in the Illinois provisions, and then relates this material to the legal history of American state constitutional conventions in general. Part V engages in the same effort with regard to the Illinois provisions for constitutional amendment initiated by the legislature.<sup>11</sup>

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9. This term, coined by Professor Peter Suber in his invaluable and erudite book, refers to the process by which amending provisions are used to amend themselves. See PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE* (1990).

10. For a definition and discussion of "political culture," see *infra* notes 87-94 and accompanying text.

11. There is also an Illinois constitutional provision for limited constitutional change through popular initiative. ILL. CONST. of 1970, art. XIV, § 3. Eighteen states, including Illinois, presently allow constitutional amendment in some form through popular initiative. Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 *PUBLIUS: J. FEDERALISM*, Winter 1987, at 153, 177. The Illinois provision was adopted quite late in the history of popular initiative generally, and is limited both textually and by interpretation to quite narrow circumstances. Because the Illinois provision has been in existence only since 1970, is clearly of such limited use, and is a narrow and atypical provision relative to other states, popular initiative is not profitably treated in this work. See *id.* ("[T]he constitutional initiative is not the typical amending process, having been adopted

The body of material in Parts IV and V establishes that the evolving Illinois political culture has produced negative popular attitudes toward constitutional change, and that this has been traditionally reflected in the relative inflexibility of the state constitutional amendment process. This material relates not only how this popular and textual resistance to constitutional change developed in Illinois, but suggests two further ramifications of such conservative developments. First, that such constitutional inflexibility, resulting as it has in a low level of judicial independence (in part, a corollary of judicial selection methods unchanged since the Jacksonian era and compounded by the popular message implicit in an inflexible document), may explain the relative reluctance of Illinois state courts to engage in independent and expansive constitutional interpretation. Second, the degree of constitutional inflexibility in Illinois actually may be greater than required to preserve political stability or protect minority factions. This unnecessary rigidity operates to the political and social detriment of the whole state. For example, although there has been continuing consensus for most of the modern era that regardless of the form it takes, fundamental reform is needed in the areas of judicial selection and educational financing, reform has been virtually impossible.

This Article finishes by reaching several tentative conclusions. First, a state court's conservative approach toward non-formal (judicial) constitutional amendment reflects, as in Illinois, the relative difficulty of formal textual amendment and the resulting lack of judicial independence. Second, the state court's approach is justified because it is consistent with manifested (constitutionally integrated) popular resistance to fundamental change based on appropriate concessions to local stability in light of local political culture, i.e., it is fully consistent with notions of democratic accountability appropriate in state courts. If this is so, it then becomes less clear why a state court's conservative approach toward interpretation *should* be changed notwithstanding the thrust of current scholarship which im-

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in only seventeen states and used frequently in only eight . . ."). Popular initiative as a means of constitutional change is also fundamentally different from legislative amendment or the constitutional convention. Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) > 26; (C) 26; (D) All of the Above)*, 8 CONST. COMMENTARY 409, 416-17 (1991) (noting that popular initiative is more like "revolution" than "amendment" in a constitutional government). The wisdom and appropriateness of expanding popular initiative in Illinois and other states is the subject of a separate work-in-progress.

plies that judicial philosophy, with regard to the interpretation of individual rights in a state like Illinois, can be "organized" — through litigation<sup>12</sup> or otherwise — to change significantly.

On the other hand, even though there may be little potential for encouraging "new judicial federalism" in the majority of conservative states, either through litigation or scholarship, there may still be sufficiently unnecessary rigidities inherent in the present system for constitutional amending. These unnecessary rigidities might properly be addressed by those interested in signaling the judiciary that excessive restraint in matters of independent interpretation is no longer required.

A third tentative conclusion reached by this Article is that even without easing the restrictiveness in the amendatory provisions of the constitutions of conservative states like Illinois (again, to induce expansive judicial constitutional interpretation), the existing law of *textual* or formal constitutional amendment may already provide a means for resolving problems such as accomplishing reform of judicial selection and educational financing, seemingly intractable problems in states like Illinois. There is ample precedent for the convening of a constitutional convention for the *explicitly limited* purpose of amending, and hopefully reforming, the judicial, education, and amending articles of the state constitution.<sup>13</sup> There would be undeniable political benefits for legislators who act to put to the voters the question of convening a limited convention. The delegates specially chosen to develop reforms in these properly limited areas will be free to craft and submit comprehensive and effective amendatory proposals to the people who elected them. By the same token, the legislature, by proposing a limited convention call, removes itself from political retribution for individual positions on these long-standing, divisive, and controversial issues, while maintaining its institutional and political interests through fellow partisans at the Convention.

## I.

The United States Constitution establishes the institutions and structure of governance and defines the intended political and social

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12. See generally *supra* note 8 (citing support for the notion that state courts have the power to participate in the "new judicial federalism").

13. See ILL. CONST. of 1970, arts. VI, X, XIV.



contract<sup>14</sup> within a relatively spare document. State constitutions,<sup>15</sup>

14. "[F]undamental laws [constitutions] are expressions of the sovereign will in relation to the structure of the government, the extent and distribution of its powers, the modes and principles of its operation, and the apparatus of checks and balances proper to insure its integrity and continued existence." JOHN A. JAMESON, *A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS, AND MODES OF PROCEEDING* 84 (Chicago, Calaghan & Co. 1887) [hereinafter JAMESON, *CONSTITUTIONAL CONVENTIONS*]. There have also been many other thoughtful characterizations of constitutions over the years. *E.g.*, Gordon V. Levine, *The Constitutional Initiative and the Structure and Procedures of the General Assembly*, 11 J. MARSHALL J. PRAC. & PROC. 387, 389 n.10 (1978) (citing *State ex rel. Halliburton v. Roach*, 130 S.W. 689, 694 (Mo. 1910)); Donald S. Lutz, *The Purposes of American State Constitutions*, 12 PUBLIUS: J. FEDERALISM, Winter 1982, at 27, 32 [hereinafter Lutz, *Purposes*]. James Madison believed that constitutions could be defined as embodying values that "counteract the impulses of interest and passion." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 11 THE PAPERS OF JAMES MADISON 295, 298-99 (U. Va. Press 1977). Constitutions embody such values because they are "the outcome of a process of deliberation meant to identify matters of fundamental importance to the people and to place those matters in a constitution specifically to protect them from the quotidian predations of pluralistic power struggles." James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 821 (1992) [hereinafter Gardner, *Failed Discourse*]. One scholar has noted:

State constitutions [perhaps even more so than the federal document] are documents of aspiration as well as of government. They reflect historic and contemporary debates over great issues. They allow the people to articulate and refine a theory of self-government, to decide what values they hold most dear, to fashion protection for individual rights, and, in the final analysis, to act responsibly for themselves and their posterity.

A. E. "Dick" Howard, *Introduction: A Frequent Recurrence To Fundamental Principles*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW xxiii (Bradley D. McGraw ed., 1985) [hereinafter Howard, *Introduction*].

15. State constitutions are often discussed collectively as they do not really differ significantly from one another. See Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 941 (1988) [hereinafter Grad, *Function and Form*] (stating that an examination of the fifty state constitutions alone would almost convince one that the states are fungible when, of course, they are not). This basic similarity has always been present; the original state constitutions simply summarized the political ideas which then prevailed. See generally WALTER F. DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* 1-3 (1910) [hereinafter DODD, *REVISION AND AMENDMENT*] (discussing the first state constitutional conventions as embodying the framers' political institutions); see also ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789* (1924); David Fellman, *What Should a State Constitution Contain?*, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 137 (W. Brooke Graves ed., 1960); William C. Morey, *The First State Constitutions*, in 4 ANNALS AM. ACAD. POL. & SOC. SCI. 201, 201 (1893); W.C. Webster, *A Comparative Study of the State Constitutions of the American Revolution*, in 9 ANNALS AM. ACAD. POL. & SOC. SCI. 380, 389 (1894). Nevertheless, in political science literature there are occasional attempts to distinguish or categorize state constitutions, for example, into six "constitutional patterns": (1) commonwealth; (2) commercial republic; (3) Southern contractual; (4) civil code; (5) frame of government; and (6) managerial. Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS: J. FEDERALISM, Winter 1982, at 11, 18-22 [hereinafter Elazar, *State Constitutions*]; see also JAMES Q. DEALEY, *GROWTH OF AMERICA'S STATE CONSTITUTIONS, FROM 1776 TO THE END OF THE YEAR 1914*, 118-19 (1915) (explaining that the state constitutions which existed in 1915 represent four distinct periods of political development). Such distinctions are rooted in the early settlers' differing conceptions of constitutionalism, and in "differences among the types and goals of pioneers who first settled the New World." Elazar, *State Constitutions*, *supra*, at 18-20.

on the other hand — at least since the early to mid-nineteenth century — have tended to be quite lengthy and much more detailed. They include substantially more areas of concern than the federal document.<sup>16</sup> There is a greater elaboration on the structure, purposes, operation, and financing of state and local government; often exhaustive descriptions of the power and duties of public entities, agencies, and officials; and, usually, a broad, expanded, state-specific expression of individual rights.

The greater length and detail of these state documents result from one of the most distinctive characteristics of state constitutions — they are considerably easier to amend or revise than the federal constitution and are therefore amended quite often.<sup>17</sup> Accordingly,

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As will become pertinent below, “commercial republican” constitutions prevailed in the middle states like Illinois. Such constitutions became quite lengthy because they were built on “a series of compromises required by the conflict of ethnic and commercial interests and ideals created by the flow of various streams of migrants into their territories, and the early development of commercial cities.” *Id.*

16. There are at least three unavoidable and legitimate reasons — none of which are directly pertinent to this discussion — why state constitutions are relatively longer than the federal document: (1) these documents must spend some time discussing local and county government; (2) there are numerous areas of local public concern to which these documents must respond as part of the Tenth Amendment residuary power (e.g., the ordinary mechanics of voting); and (3) it has always been essentially up to state constitutions to describe and exalt a “way of life.” Lutz, *Purposes*, *supra* note 14, at 41; see also Gardner, *Failed Discourse*, *supra* note 14, at 818-19. Still, the constitutions framed between 1861 and 1886 were about three times as long as those written during the Revolutionary period. John F. Jameson, *Introduction to the Constitutional and Political History of Individual States*, in *MUNICIPAL GOVERNMENT AND LAND TENURE* 14 (H.B. Adams ed.) (Baltimore, Johns Hopkins 1886). This was apparently:

[D]ue to a desire to include in the constitution a mention of everything from the name of God, often dragged in an inappropriate and even silly manner, down to barbed fence wire, city alley-ways, and historic paintings in state houses. [This tendency toward “comprehensiveness”] is one of the most striking facts in the history of American constitutions and [was thought to be] most deplorable. For when we introduce minor details into such an instrument, we [necessitate frequent amendments and eventually] impair the reverence with which constitutions ought to be regarded [and introduce] undesirable instability.

*Id.*; see also DODD, *REVISION AND AMENDMENT*, *supra* note 15, at 249 (supporting the proposition that constitutions resemble legislative codes); Gardner, *Failed Discourse*, *supra* note 14, at 818-19 (explaining that state constitutions often contain detailed or lengthy provisions about concerns which are handled by the legislature at the federal level and are not found in the U.S. Constitution); Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1510 (1987) (noting that many “state constitutions are almost indistinguishable from statutory codes in their length, scope and subject matter”).

17. By 1987, there had been over 230 state constitutional conventions in the United States. May, *supra* note 11, at 164. In addition, “A tally of all amendments to state constitutions currently in force [yielded] a total of 8,279 submitted to the voters in forty-nine states, 5,083 approved by the voters in forty-nine states, and 5,198 adopted in the fifty states.” *Id.* at 162.

state constitutions have been expanded over the years by the addition of numerous popular and legislative amendments resulting from transient political or social concerns arising at one time or another in a state's history.<sup>18</sup> The resulting prolixity reflects several important political advantages gained from easily amended state constitutions. One valuable benefit is that states may act as "local laboratories" in the federal system of government. State constitutions have always expressed regional ideals in a creative way, facilitated experimentation in government, and provided unique views of the social contract or innovative solutions to local problems.<sup>19</sup> Local needs, aspirations, and official responses to historical or economic dilemmas

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18. For this reason, almost all state constitutions contain extraordinary amounts of detail which seem absurd or superfluous. W. Brooke Graves, *Use of the Amending Procedure*, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 140-46 (W. Brooke Graves ed., 1960); see Elazar, *State Constitutions*, *supra* note 15, at 16 (citing numerous examples from throughout history); Colantuono, *Comment*, *supra* note 16, at 1510 (providing examples which include provisions for free rail transport, requiring the teaching of home economics in public schools, and defining the "durable hard surface" required of those constructing a public street); see also ARIZ. CONST. art. XXVI, § 1 (enumerating the kinds of documents real estate brokers can sign); CAL. CONST. art. 13, § 10 (describing the way taxes are to be assessed on golf courses); ORE. CONST. art. IX, § 8 (regulating the purchase of stationery used in state offices); TEX. CONST. art. 16, § 16 (providing for "unmanned teller machines"). The New York Constitution specifies the width of ski trails in the Adirondack State Park (N.Y. CONST. art. 14, § 1), and because of problems inherited from the early Dutch settlements, it also regulates feudal land tenure.

19. In the words of Justice Louis Brandeis, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Oliver Wendell Holmes had earlier referred to "social experiments . . . in the insulated chambers afforded by the several States . . ." *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting); see also *Williams v. Florida*, 399 U.S. 78, 133 (1970) (Harlan, J., concurring) (stating that "incorporation" under the Fourteenth Amendment Due Process Clause "must be tempered to allow states more elbow room in ordering their own criminal systems"). Justice Lewis Powell has argued that the Brandeis tradition in economic and social reform might even bring about "valuable innovation" in criminal procedure. *Johnson v. Louisiana*, 406 U.S. 356, 376 (1972); see also A. E. "Dick" Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 940 (1976) [hereinafter Howard, *Burger Court*] (discussing Justice Brandeis's notion of experimentation within the states). This is because:

[The] experimental function [that federalism allows and encourages in the states] need not be confined to state legislatures or executive branches. State courts also could assist each other in the development of state constitutional law just as in the past they have experimented and learned from each other in common law.

Dennis NettikSimmons, *Towards a Theory of State Constitutional Jurisprudence*, 46 MONT. L. REV. 261, 281-82 (1985); see also Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1141-42 (1985) [hereinafter Abrahamson, *Criminal Law*] (discussing the application of the "Brandeis laboratory metaphor"); Vito J. Titone, *State Constitutional Interpretation: The Search for An Anchor in a Rough Sea*, 61 ST. JOHN'S L. REV. 431, 434 n.17 (1987) (noting that state courts have been recognized as laboratories for "experimentation").

(even those dilemmas common to other states) will differ among sister states or from those of the nation. Because of the potentially useful influence of such experiments on other states and on the nation, state-specific experimental provisions in state constitutions are valuable to our federal system of government.<sup>20</sup>

Another reason for lengthy state constitutions is that citizens universally have come to develop an intense, but usually well-deserved, mistrust of state legislatures, bodies which control many of the details of their everyday lives. There are substantial prejudices against executive power as well. Popular attitudes of this sort developed quite early, resulting from both colonial and nineteenth-century abuses.<sup>21</sup> Fortunately, easily-amended state constitutions tradition-

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20. State constitutions strengthen federalism when states "articulate, and live by, standards that suit their different needs." Colantuono, *Comment, supra* note 16, at 1474 (citing Hans A. Linde, *E. Pluribus — Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 193-200 (1984) [hereinafter Linde, *E. Pluribus*]). Local experimentation with the social compact is justified because:

[T]here exists a wide range of issues in which the dominant interests in any state can act as if they had statewide consensus behind them. These include some substantive issues in which the welfare or interests of the bulk of a state's citizenry are clearly involved . . . , certain fundamental procedural issues that are important because they concern the maintenance of the state itself . . . , and at least a few issues which, while not necessarily reflecting a "state" interest as such, do reflect the opinions of a solid majority of the state's citizens [e.g., anti-government prejudice in the West] . . . . [Moreover, there are] a wide variety of ways in which each state, as a reasonably autonomous civil society, can capitalize on its potential for internal unity . . . . [The] extent to which a state possesses internal unity [may vary] from issue to issue . . . . [Nevertheless, the] particular issues that unite the states internally are deeply rooted in their respective geographic and historical settings [even] when the meaning of those patterns [of common traditions needs and interests] is not readily understood by the state's citizenry.

DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 10-11, 12, 21 (2d ed. 1972) [hereinafter ELAZAR, AMERICAN FEDERALISM]. But see generally Gardner, *Failed Discourse, supra* note 14 (arguing that there is a general similarity in "values" held by citizens in all states in the modern era). It is also unclear whether state by state diversity will turn out to be an asset in the former Soviet Union.

21. The early state constitutions "were short . . . [but] instituted annual elections and other mechanisms for avoiding the abuse of governmental authority and ensuring responsiveness to popular sentiments." G. Alan Tarr & Mary Cornelia Porter, *Introduction: State Constitutionalism and State Constitutional Law*, 17 PUBLIUS: J. FEDERALISM, Winter 1987, at 1, 3 [hereinafter Tarr & Porter, *Introduction*] (citing DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS (1980) [hereinafter LUTZ, POPULAR CONSENT]). Most of the growth of provisions limiting the powers of government occurred during the second half of the nineteenth century. *Id.*; see also ELLIS P. OBERHOLTZER, THE REFERENDUM IN AMERICA 78-98 (1912); W. Brooke Graves et al., *Forward to MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION v-vi* (W. Brooke Graves ed., 1960); Louis J. Sirico, Jr., *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637, 659 n.126 (1980). The cause of this growth was primarily distrust of the increasing exercise of legislative favoritism through special legislation, a distrust aggravated by the early economic crash of 1837. See, e.g.,

ally have been available to limit the otherwise plenary power of states to make laws and govern themselves.<sup>22</sup> Drafters and revisers of state constitutions, therefore, have increasingly tended to supply specific limitations on governmental power in order to better articulate the "framers'" intent and guide judicial review when assertions of official power are challenged.<sup>23</sup>

Of course, while all this state constitutional amending has great political value, at the same time, the ensuing prolixity has important ramifications for effective governance. First, state officials cannot govern flexibly in response to modern circumstances under an old

G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 *RUTGERS L.J.* 841, 860-61 (1991) (discussing constitutional limits on legislative grants of special privileges and immunities). This was the experience in Illinois as well. See *People v. Meech*, 101 Ill. 200, 209 (1881) (referring to the "great wrongs, oppression, and the most disastrous results of special legislation that had obtained under the Constitution of 1848, and the fact that such legislation conferred special privileges and exemptions on the few to the injury of the many"); see generally JAMES W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW-MAKERS* (1950) (noting periods of distrust of and loss of legitimacy in both the state legislatures and Congress). This abuse in Illinois led to a constitutional prohibition on the power of the legislature to enact such special laws upon a long "laundry list" of twenty-two classes of subjects. ILL. CONST. of 1870, art. IV, § 22 (amended 1970).

22. Such limitation is unnecessary with regard to the federal Constitution because, by contrast, it is a grant of specifically enumerated powers upon which all presumably limited exercises of federal power are to be based. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 173 (1868); JAMESON, *CONSTITUTIONAL CONVENTIONS*, *supra* note 14, at 86-88; Howard, *Introduction*, *supra* note 14, at 935. As James Madison wrote:

[T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

Eugene L. Shapiro, *State Constitutional Doctrine and the Criminal Process*, 16 *SETON HALL L. REV.* 630, 644-46 (1986) (citing *THE FEDERALIST* NO. 45, at 290 (James Madison) (H. Lodge ed., 1900)); see also COOLEY, *supra*, at 87, 173-77 (explaining that state governments possess "all the general powers of legislation"); Robert F. Williams, *State Constitutional Law Processes*, 24 *WM. & MARY L. REV.* 169, 178-79 (1983) [hereinafter Williams, *Processes*] (contrasting state constitutions, as documents of limitation, with the federal Constitution as a grant of specific power).

23. This is necessary because state judges (and subsequent legislatures) are inclined to follow a strict construction of most provisions limiting the operation of state government. ELMER E. CORNWELL, JR., ET AL., *STATE CONSTITUTIONAL CONVENTIONS: THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES* 8 (1974) [hereinafter CORNWELL ET AL., *POLITICS OF REVISION*]. Consequently, "There has been far less interpretative constitutional development at the state than at the national level. [Judicial] interpretation has been less important [in facilitating government on the state level] than the more formal processes of amendment and revision." *Id.* But see Michael Kammen, *Introduction to THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY* xx (Michael Kammen ed., 1986) ("Perhaps [this] only tells us that achieving a national consensus for [constitutional] change in a large and diverse society is much more difficult than achieving a statewide consensus for change.").

constitution that contains numerous restrictions, manifestations of long forgotten political compromises,<sup>24</sup> excessively detailed treatment of local matters, and hortatory statements of principle.<sup>25</sup> State constitutions tend to accumulate so many experimental proposals, obsolescent concerns, and superfluous restrictions on official action that frequent changes are necessary to adjust to new conditions.<sup>26</sup>

24. See, e.g., Elazar, *State Constitutions*, *supra* note 15, at 19-21 (commenting on the nature of the political compromises that have resulted in lengthy and detailed Midwestern state constitutions).

25. See generally Fellman, *supra* note 15, at 144-50 (discussing in detail the causes of prolixity and the dangers of obsolescent or archaic language). After surveying the New York Constitution in 1958 for purposes of simplification, a committee of legal scholars reported that they were "literally amazed by the extent to which [it] contain[ed] hollow phrases, defective provisions, and creaking antiquated policies." INTER-LAW SCHOOL COMMITTEE, REPORT ON THE PROBLEM OF SIMPLIFICATION OF THE CONSTITUTION TO THE NEW YORK SPECIAL LEGISLATURE 330 (1958); see also Kimbrough Owen, *The Need for Constitutional Revision in Louisiana*, 8 LA. L. REV. 1, 2 (1947) ("The document will trip, entangle, infuriate and then exhaust [a lay student]."). Excessive constitutional detail leads to ineffectiveness in government. Fellman, *supra* note 15, at 145 (citing *Application of Central Airlines*, 185 P.2d 919 (Okla. 1947)). In *Central Airlines*, the Oklahoma Constitution gave the state Corporation Commission jurisdiction to regulate "all transportation and transmission companies." The provision defined those terms as railroads, steamship lines, express companies, and the like. But air transport did not exist when the enumeration in the statute was written, so the Oklahoma Supreme Court held that the Commission had no jurisdiction over air transport. *Central Airlines*, 185 P.2d at 924. "From a strictly legalistic point of view, the holding that an enumeration excludes all things not in the list was not a bad decision, but from a policy point of view it makes no sense at all." Fellman, *supra* note 15, at 145.

The detailed language of most state constitutions leaves far less room for change, thus interpretation becomes secondary to the more formal processes of revision. Ernest R. Bartley, *Methods of Constitutional Change*, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 23 (W. Brooke Graves ed., 1960). Still, there is much potential for constitutional growth through interpretation, even if not with regard to individual rights. An example is state financial borrowing which is clearly and closely restricted in most state constitutions — even though legislatures, with the concurrence of the executive and the courts, seem to be able to find through subterfuge all sorts of ways of "borrowing" anyway. *Id.* at 23. Illinois has followed this same pattern in areas such as taxation. When the property tax was found to be inadequate in terms of financing state and local government during the Depression, the Illinois legislature tried a graduated income tax. In *Bachrach v. Nelson*, 182 N.E. 909 (1932), however, the Illinois Supreme Court invalidated the tax because income was property and subject to uniformity provisions in the constitution. Moreover, the court said that the constitution did not permit other kinds of taxes; the legislature could only add to the list of occupations, franchises, and privileges designated as taxable. This resulted, ultimately, in a retailers occupation tax, which was really a legal fiction. In fact, it was a sales tax on buyers or on transactions, rather than a tax on retailers. This fiction was approved, more or less, by the state supreme court. See *Winter v. Barrett*, 186 N.E. 113 (1933). Other public officials raised no objection. "Adlai Stevenson believed that the difficulty of amending the Illinois constitution before 1950 made evasion of the law a practical necessity in order to avoid 'anachronisms' of the Illinois constitution." SUBER, *supra* note 9, at 17 (citing Robert L. Farwell, *Gateway to What?*, 10 DEPAUL L. REV. 274, 278 (1961)). Thus it seems that Illinois courts feel justified in supporting attempts by the *other* branches to govern "creatively."

26. The United States Constitution is also afflicted with language expressing obsolescent concerns. See, e.g., U.S. CONST. art. I, § 10, cl. 1 (containing provisions regarding letters of marque and reprisal).

Second, while many legislatively initiated amendments might have been necessary to reverse the deleterious effects of earlier judicial opinions interpreting constitutional or statutory provisions<sup>27</sup> — or to respond to the need for fundamental structural change to promote effective government — most constitutional measures could, and arguably should, have been enacted as “ordinary” legislation. These measures do not become ordinary law because legislators become overly cautious or “defensive” as a result of the numerous constitutional restrictions on their power. They become convinced that they need somehow to create greater permanence for their work.<sup>28</sup> They seek, in other words, to use “constitutional legislation”<sup>29</sup> to prevent either the state high court or future political majorities from meddling with whatever policies, principles, or programs the present

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27. Many provisions in modern state constitutions were adopted to overcome earlier judicial interpretations prohibiting the exercise of power. These provisions, which are essentially grants of power, may also be used to remove constitutional ambiguity or to ratify and protect pre-existing practices. Williams, *Processes*, *supra* note 22, at 178-79, 195-96; see also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 108 (1973) (elaborating on the states' use of constitutional provisions to reach legislative goals through anti-legislation); Note, *Developments*, *supra* note 4, at 1355-56 (discussing the state courts' role in interpreting state constitutions as often open-ended and controversial). See generally W. Mark Crain & Robert D. Tollison, *Constitutional Change in an Interest-Group Perspective*, 8 J. LEGAL STUD. 165, 168-74 (1979) (explaining the process of constitutional change in state governments).

28. Whereas Congress often turns potential constitutional amendments into statutes (for example, the Sherman Antitrust Act and the Civil Rights Act of 1964), state legislatures frequently constitutionalize legislative policy. May, *supra* note 11, at 167 (citing Elmer E. Cornwell, Jr., *The American Constitutional Tradition: Its Impact and Development*, in *THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE* 57 (Kermit L. Hall et al. eds., 1981) [hereinafter Cornwell, *Constitutional Tradition*]). The constitutional amendment process is thought to offer both the public and the legislature opportunities for various kinds and magnitudes of changes in social policy not possible through other channels. Williams, *Processes*, *supra* note 22, at 175 (inquiring whether state constitutions are “instruments of law making through which interest groups . . . seek the grand prize of law making, striving to achieve constitutional status for the policies they advocate”). This “legislation” in constitutional form is thought to be largely insulated by the greater burden presented by the constitutional amendment process; any amendatory procedure would seem more involved and difficult than obtaining a legislative majority to pass an act of repeal. Yet the texts of most state constitutions are much more volatile — certainly more so than their federal counterpart — because they are extraordinarily subject to change from a number of different sources. These sources include legislative proposals, referenda, initiative amendments, and the relatively numerous proposals submitted to state voters by frequent constitutional conventions. Note, *Developments*, *supra* note 4, at 1353-54. Consequently, amendment of most state constitutions can be initiated easily and consummated by simple majority vote in a referendum, and state constitutions are “amended [if not quite as often as statutory provisions, than at least] at a furious rate.” Williams, *Processes*, *supra* note 22, at 176.

29. Amendments proposed as instruments through which interest groups or discrete segments of society seek constitutional stature for the policies they advocate when ordinary legislation would otherwise be adequate. Williams, *Processes*, *supra* note 22, at 196.

majority finds "inspired,"<sup>30</sup> regardless of whether political opposition or constitutional challenges would ever materialize were these measures instead promulgated through ordinary legislation. They also proceed despite the fundamental harm the resulting constitutional prolixity might cause.<sup>31</sup> In this fashion, each succeeding generation of powerful factions attempts to preserve for posterity its views and policies.<sup>32</sup> Thus legislators, perhaps even more than draft-

30. For some reason, members of constitutional conventions, like legislators, occasionally assume they are wiser and more righteous than members of future conventions or legislatures. Thus, a member of the 1870 Illinois convention declared:

It is assumed that when we depart from this hall all the virtue and all the wisdom of the state will have departed with us. We have assumed that we alone are honest and wise enough to determine for the people the ordinary, and in many instances even the most trivial, questions affecting the public welfare; as if the mass of people of the state of Illinois were not as competent hereafter to select others that are honest and capable as they were to select us.

Fellman, *supra* note 15, at 144 (quoting WALTER F. DODD, *STATE GOVERNMENT* 96 (2d ed. 1928) [hereinafter DODD, *STATE GOVERNMENT*]).

31. Excessive constitutional "legislating" undermines the notion of a "higher" law and judicial review itself. Even as early as the 1760s and 1770s, colonial leaders argued that:

[V]arious parliamentary enactments were void because they violated higher principles of the British Constitution reflected in revered texts like Magna Charta, and in fundamental unwritten and common law traditions. These colonists came to define the British Constitution not merely as the structure and arrangement for governmental institutions, but also as a set of substantive legal principles limiting the legitimate exercise of government power.

Akhil R. Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1432 (1987) (citing BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 175-98 (1967); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Thought*, 30 *STAN. L. REV.* 843 (1978)). Thus:

Our whole political system rests on the distinction between constitutional and other laws. The former are the solemn principles laid down by the people in its ultimate sovereignty; the latter are regulations made by its representatives within the limits of their authority, and the courts can hold unauthorized and void any act which exceeds those limits. The courts can do this because they are maintaining against the legislature the fundamental principles which the people themselves have determined to support, and they can do it only so long as the people feel that the constitution is something more sacred and enduring than ordinary laws, something that derives its force from a higher authority.

DODD, *REVISION AND AMENDMENT*, *supra* note 15, at 253.

32. "Policy issue" amendments, which could be dealt with by ordinary legislation — or, for that matter, by statewide non-binding referenda (*see, e.g.*, 10 *ICLS* §§ 5/28-9 to -13 (1993)) — "are almost equal to, and may even outnumber, amendments concerned with subject matter usually associated with constitutions — structures, powers, processes, and bills of rights." May, *supra* note 11, at 165 (citing Cornwell, *Constitutional Tradition*, *supra* note 28, at 26-28). Of course, constitutional legislation is often enacted for sound reasons as well. Some provisions advanced by legislators simply record (rather than avoid or redirect) change in social policy thought significant enough to be treated as permanent. Also, merely *proposing* amendments sometimes provides a forum for the popular resolution of major local social conflicts; for example, income taxation, school busing, environmental protection, and official corruption. However, by the same token, ac-



ers and revisers of state constitutions, are responsible for the enormous growth in the substance of state charters.

The commonness of constitutional legislation has had an important impact on judicial interpretation of state constitutions. For example, much of this amending — whether through legislative action, conventions, or revision committees — produces innovative, state-specific provisions.<sup>33</sup> These provisions are an invitation to state judges to engage in independent, expansive interpretation in order to promote and assist local governmental experimentation.<sup>34</sup> Also, by

ceptance of this practice of regularly submitting amendatory constitutional measures allows legislators to occasionally act irresponsibly: to relegate policy-making to the people directly, taking no personal responsibility for the bills they draft:

[After all, in] proposing amendments legislatures do not have upon them the responsibility for final action, and if a proposed amendment is adopted and works badly the blame can easily be shifted to the people who approved it by their votes. Then, too, ordinary legislation is subject to the check of executive disapproval, which does not apply to the proposal of amendments.

DODD, REVISION AND AMENDMENT, *supra* note 15, at 273-74; *see also* May, *supra* note 11, at 165 (discussing the legislative character of state constitutional politics). The most recent example in Illinois was the measure on the November, 1992 ballot to amend the Illinois education article in an effort to reform public school financing. Rather than holding hearings to determine and enact the appropriate broad scheme of state revenue production that school financing reform required, a proposed constitutional amendment to, *inter alia*, require greater state financing (as opposed to continuing oppressive local property tax support) was placed on the ballot. This was done without any prior legislative effort to resolve the very real problem that increased income tax might *exceed* any possible reductions in local property tax. If the amendment had succeeded, the legislature could have blamed the resulting higher taxes on the voters; since the measure failed, the legislature can still blame the inequitably financed schools on the voters. By proposing a constitutional amendment, legislators avoid the politically risky exposure flowing from hearings and debates on the issues. *See* R. Bruce Dodd, *Tragic Flaws Mar the School-aid Amendment*, CHI. ENTERPRISE, September 1992, at 7; Michael D. Klamens, *To Fund or Not to Fund Schools*, ILLINOIS ISSUES, June 1992, at 8-9; James D. Nowlan, *Why School Amendment Shouldn't Be Approved*, CRAIN'S CHI. BUS., Sept. 7, 1992, at 13.

33. *See* Walter F. Dodd, *The Problem of State Constitutional Construction*, 20 COLUM. L. REV. 635, 637 (1920) [hereinafter Dodd, *Constitutional Construction*]; Frank E. Horack Jr., *Co-operative Action for Improved Statutory Interpretation*, 3 VAND. L. REV. 382, 384 (1950); Note, *State Constitutional Change: The Constitutional Convention*, 54 VA. L. REV. 996, 998-1000 (1968) [hereinafter, Note, *Constitutional Change*]. *But see* CORNWELL ET AL., *POLITICS OF REVISION*, *supra* note 23, at 8 (discussing the state amendment process).

34. *See supra* note 23 and accompanying text (discussing judicial interpretation of state constitutions). This may also be the case with regard to the interpretation of innovative individual rights provisions. Note, *Developments*, *supra* note 4, at 1348-51. The unique role and responsibilities of federal constitutional law compel "a circumspect and conservative approach to federal constitutional issues. Federal jurisprudence presses toward a reliance on bright lines." *Id.* As one scholar has stated:

Federal courts are apt to be selective in the targets they pick, and restrained in the constitutional limits they prescribe, because they strive to preserve their credibility for the defense of the most important guarantees and principles. . . . State courts are largely free of these restraints and hence can approach state constitutional interpretation more innovatively, even experimentally. Because they are concerned with smaller,

covering a broader range of concerns with what is often a code-like comprehensiveness and specificity, state constitutions confuse the sense of distinction generally clear in the federal courts between "straight-forward" statutory construction and "open-ended" constitutional interpretation.<sup>35</sup> (In fact, unlike interpretation at the federal level, state constitutional interpretation actually may be tantamount to statutory construction.)<sup>36</sup> Independent and expansive interpretation at the state level therefore seems more appropriate and defensible: it is less controversial and less often criticized as being "open-ended" than at the federal level. Thus, the practice of enacting constitutional legislation would seem to arguably create a receptive legal environment for judicial activism.

Of course, state courts are ordinarily reluctant to imply limita-

occasionally more homogeneous jurisdictions, state courts can develop principles more closely attuned to local circumstances. . . . [S]tate courts can more comfortably risk taking stands that may be perceived to be more political or intrusive on majority rule.

*Id.*

35. *Id.* at 1355. *See, e.g.,* May, *supra* note 11, at 166. May states:

[S]tate constitutions in several key respects resemble statutory law more than . . . [the] aloof, unchanging federal Constitution. Both their susceptibility to revision in response to popular opinion and the wealth of content they encompass encourage a view of state constitutions as integral parts of the democratic state governmental processes, not as external restraints placed on them.

*Id.* (citation omitted); *see also infra* note 36 and accompanying text (discussing the tension between notions of statutory construction and constitutional interpretation and how this tension relates to state constitutional provisions).

36. Judicial interpretation of state constitutional provisions has become somewhat more confusing and complex because of continuing uncertainty about the relationship between statutory construction and constitutional interpretation. For example, as a result of the doctrine of "negative implication," many grants of authority to state legislatures become limitations on legislative power through judicial interpretation. Williams, *Processes*, *supra* note 22, at 201-02. Also, because of the increasing use of the constitution as an alternate vehicle for law-making, there is occasionally an unjustified but almost *de facto* presumption that constitutional provisions are self-executing, when enforcement of such provisions could (and, it often turns out, should) have been relegated to statutory law. *Id.* at 175, 177, 199. Professor Gardner writes:

Perhaps state constitutional provisions might be viewed, like statutes, as outcomes of frankly pluralistic power struggles, but concerning subjects that the polity wants for some reason to remove from the political agenda for some period of time. Indeed, this seems to be the direction in which state supreme courts have moved; they are generally unwilling to invoke the grandest interpretive strategies of constitutionalism, but are nevertheless forced to treat constitutional positive law as somehow different from ordinary statutory law.

Gardner, *Failed Discourse*, *supra* note 14, at 833. State judges may be intuitively correct. "[T]here may turn out to be only differences of degree rather than of kind between maxims of statutory construction and rules of [state] constitutional interpretation." Note, *Developments*, *supra* note 4, at 1355; *see also* May, *supra* note 11, at 166 (contrasting the state constitutions with the federal Constitution); Note, *Developments*, *supra* note 4, at 1353 (noting that state constitutions resemble statutory law more than the federal Constitution).

tions on otherwise plenary-powered state governments.<sup>37</sup> This may work against expansive judicial construction of state constitutions — including state bills of rights provisions.<sup>38</sup> Nevertheless, a number of factors relating to the *process* by which state constitutions are amended, and to federalism generally, encourage activism in state high courts. The process of state constitutional amendment, for example, includes: (1) the near universal requirement that measures to revise or amend a constitution be subjected to popular ratification; and (2) frequent amendments, which guarantee the availability of relatively recent, complete, and accessible legislative histories regarding most state revision or amendment efforts.

The right of informed popular consent to constitutional change is certainly one of the important residual bases of “popular sovereignty”; this near universal requirement among the states supports the legitimacy of state judicial activism and thus encourages it in several ways. First, popular ratification makes it far more difficult than it would be in the federal courts (where the Constitution was *not* brought into effect by popular referendum) to justify judicial interpretation based on post hoc conclusions about the “intent” of the framers. Instead:

[T]he “common and ordinary meaning” in which the constitution’s words

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37. This is because when legislation is challenged as unconstitutional, the issue is not whether the measure is *authorized* by the state constitution (as is the case with federal legislation), but whether it is *prohibited* by the language of that document. In other words, an important product of federal constitutional interpretation has been the notion of *implied power*; but *implied limitations* are the important judicial determinations regarding state constitutions. See, e.g., Williams, *Processes*, *supra* note 22, at 178 (noting that state constitutions are documents of limitation whereas the federal Constitution provides grants of specific power) (citing W. F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137, 160 (1919) [hereinafter Dodd, *Implied Powers*]). This distinction has advantages for state citizens. For example, in the absence of explicit limiting language, state courts would presumably be *empowered* to hear cases, not limited by self-imposed rules of justiciability as are federal courts. Gardner, *Failed Discourse*, *supra* note 14, at 809. Thus, many state courts have more relaxed rules of standing. *Id.* (citing Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1298-1303 (1985)); NettickSimmons, *supra* note 19, at 285. In any event, in the absence of clear constitutional language speaking to a challenged exercise of state power, state courts are reluctant to imply limitations which would impede the presumptively rational conduct of a state government with plenary power. Courts are obviously far more willing to restrain the federal government which is specifically *limited* to certain enumerated powers. Williams, *Processes*, *supra* note 22, at 201-02.

38. Because of Judge Cooley’s view that state constitutions are *limitations* on plenary legislative power, “a state court’s interpretation of its bill of rights does not represent a substantial departure from its normal constitutional function.” Shapiro, *supra* note 22, at 646. State judiciaries generally construe the documents so strictly that “change and growth by interpretation” is difficult and rare. Bartley, *supra* note 25, at 23.

must be construed is the meaning they would have had to the vast majority of ordinary voters [who ratified the provision] rather than to a group of highly educated lawyers and legislators, as may sometimes be considered when construing statutes.<sup>39</sup>

Further, because it is fully informed consent — in the sense that the voters will tend to be familiar with contemporary public debate on preconvention problems and have access to voter pamphlets and news reports of convention debates — state judges are better able to discern the voters' intent when ambiguous situations call for the use of extrinsic interpretative materials.<sup>40</sup> Finally, state constitutions tend to reflect current, and thus better understood, social mores and values because they are revised, amended, and ratified relatively frequently. That is, the “normative values expressed [in state constitutional provisions] have undergone continuing review by both the people and their elected representatives” and are framed in terms that possess a particular meaning for the modern intellect.<sup>41</sup> Conse-

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39. Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 510 (1984) [hereinafter Utter, *Freedom and Diversity*] (emphasis added); see also Charles R. Adrian, *Trends in State Constitutions*, 5 HARV. J. ON LEGIS. 311 (1968) (noting the influence of the populace on state constitutional provisions); Shapiro, *supra* note 22, at 652-53 (explaining methods for ascertaining the intention of the voters). Scholars have noted that:

[T]o shed light on ambiguous constitutional language, [a state court must] look to the original intent and understanding underlying the constitutional provision. Because a state constitution is the expression of the people's will, a state court must be concerned primarily with the intent of those who ratified the document. Evidence of the drafters' intent becomes important because, in many cases, it is the only evidence we have of the people's understanding . . . [of the] social and political setting in which the provision originated or when the change took place.

Utter & Pitler, *supra* note 8, at 657.

40. Utter & Pitler, *supra* note 8, at 657 (citing Linde, *E. Plubius*, *supra* note 20, at 183). In addition to what the framers would have thought a desirable result as reflected in the convention debates or reports, there are other important factors to be considered, including: (1) the language of the provision; (2) the provision's place in the structure of the document; (3) the common law codified in or rejected by an amendment; (4) relevant case law contemporaneous to the enactment; and (5) the unique traditions, history, character, and other surrounding circumstances “that can be discerned through the exercise of ordinary common sense.” Titone, *supra* note 19, at 463 (citations omitted). These resources, primarily “[m]inutes of the convention's proceedings, contemporaneous news accounts, summaries included on the ballots, and the antecedent circumstances giving rise to a constitutional change[, are] all . . . examined in ascertaining the intention of the voters.” Shapiro, *supra* note 22, at 652-53 (citing L. Harold Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 FLA. ST. U. L. REV. 567, 569 (1978)); see also Utter, *Freedom & Diversity*, *supra* note 39, at 511-13, 516-18 (discussing the importance of ascertaining the intent of the people involved in adopting specific provisions); Williams, *Processes*, *supra* note 22, at 197-98 (noting the difficulties present in attempts to ascertain the intent of the people).

41. Titone, *supra* note 19, at 462 (citing Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Court Rejection of Supreme Reasoning and Result*, 35 S.C. L. REV. 353, 387 (1987) [hereinafter Williams, *Supreme Court's Shadow*]).

quently, the "non-interpretivist" argument which predominates at the federal level — that provisions must be construed in terms of the "spirit" of the text rather than the "divined" intent of the Framers because the Framers' true intent cannot reliably be discerned — loses much of its force when applied to more modern state documents.<sup>42</sup> Even conservative state justices are encouraged toward expansive interpretation by this fact.

There is a second way in which popular ratification supports independent judicial interpretation. The frequency of amendment means that:

[S]tate citizens have a greater opportunity to . . . articulate new shared ideals or individual rights [which] might justify greater use of broadly formulated state provisions and of the discretion of state judiciaries in reviewing the acts of government [because a] judicial construction of a broad constitutional provision that was simply out of touch with the current ideals of the state could be vetoed through the democratic process of constitutional amendment.<sup>43</sup>

In fact, as Professor Eugene Rostow initially pointed out many years ago, the very legitimacy of judicial review in a democratic society rests in large part upon the continuing power of the electorate to amend a constitution in order to revise judicial decisions involving constitutional adjudications.<sup>44</sup> This power vested in the peo-

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42. *Id.* State courts should construe state constitutions by means of "interpretivism." See generally Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985) (arguing that the current governmental structure hinders noninterpretive state court review); see also Utter, *Freedom & Diversity*, *supra* note 39, at 524-25 (noting that judges should consider current values and conditions when interpreting state constitutions). "Interpretivists argue that constitutional decision-making must be based upon the original intent of the [framers] to ensure that the will of the [people, as] reflected in the normative values expressed within the four corners of the [document,] is implemented." Titone, *supra* note 19, at 432.

43. NettikSimmons, *supra* note 19, at 278-79. "[T]he art and technology of winning elections are harnessed to changing state constitutions on a direct and regular basis. There is literally no federal parallel to this kind of politics." May, *supra* note 11, at 165; James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43, 44-45 (1983). Since amendment votes usually focus on single issues, when these issues are politically sensitive (e.g., capital punishment, school busing, or abortion) political conflict and confrontation tend to become exacerbated in the state, contributing to a focused electoral politics unknown at the federal level. May, *supra* note 11, at 166.

44. Fischer, *supra* note 43, at 88-89 n.225; May, *supra* note 11, at 170; Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 197-98 (1952); Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is there a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 34 (1989) [hereinafter Utter, *State Constitutional Law*]; see also Grover Rees III, *Constitutional Conventions and Constitutional Arguments: Some Thoughts About Limits*, 6 HARV. J.L. & PUB. POL'Y 79, 82 (1982) (stating that "[t]he amending process is a link, however tenuous, to the idea of government by consent"). This relationship between judicial review and textual flexibility is more pronounced in

ple has been "the most important electoral check on state court interpretation."<sup>45</sup> Thus, the requirement in almost every state constitution for popular participation in the amendment or revision process gives greater political legitimacy to judicial "activism" at the state level because the constitutional text (and the state judiciary itself) is subject to more direct democratic control than at the federal level.

Our system of federalism also encourages independent interpretation. Much "of the case for state courts' playing an active role in developing an independent body of state constitutional law turns on constitutional theory — the place of state constitutions and state courts in the federal system."<sup>46</sup> State court justices have different

the case of state constitutions. Although judicial review was not explicitly embodied in early state constitutions, it attained formal recognition in several state cases between 1778 and 1787, many years before its quiet introduction at the federal level. Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS: J. FEDERALISM, Winter 1982, at 57, 62 [hereinafter Sturm, *American State Constitutions*]. To illustrate this point, compare *Holmes v. Walton* (N.J.) (1780); *Trevett v. Weeden* (R.I.) (1784) and *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787) with *U.S. v. Ferreira*, 54 U.S. (13 How.) 40, 52-53 (1851) (citing *U.S. v. Yale Todd* (Feb. 17, 1794)); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and *Hayburn's Case*, 2 U.S. (2 Dallas) 409 (1792). This may well be attributable to the fact that the early state constitutions were "more communitarian in orientation than the federal Constitution . . . [and placed] more emphasis on direct, continuing consent of popular majorities." Elazar, *State Constitutions*, *supra* note 15, at 12 (citing Donald S. Lutz, *The Theory of Consent in the Early State Constitutions*, 9 PUBLIUS: J. FEDERALISM, Spring 1979, at 11 [hereinafter Lutz, *Theory of Consent*]).

45. May, *supra* note 11, at 170-71, 177 (citing, for example, the recognition of this fact in *Commonwealth v. O'Neal*, 339 N.E.2d 676, 679 (Mass. 1975), where the Massachusetts Supreme Judicial Court essentially suggested that their instant death penalty decision should be overturned by the voters if it was inconsistent with public opinion); Utter, *State Constitutional Law*, *supra* note 44, at 35 (citing Donald E. Wilkes, Jr., *First Things First: Amendomania and State Bills of Rights*, 54 Miss. L.J. 223, 233 (1984)); see also Dorothy T. Beesley, *The Georgia Bill of Rights: Dead or Alive?*, 34 EMORY L.J. 380 (1985). For additional discussion of specific examples of ratification of independent state decision-making through concrete attempts at state constitutional amendment, see Utter, *State Constitutional Law*, *supra* note 44, at 36-39.

46. Howard, *Introduction*, *supra* note 14, at xx. The federal and state court systems perform different functions and have different roles and duties. Thus, for a number of reasons, the Supreme Court of the United States limits itself to providing only a minimum level of federal constitutional rights. Note, *Developments*, *supra* note 4, at 1348-49, 1358; Timothy R. Lohruff, Note, *United States v. Leon and Illinois v. Gates: A Call for State Courts to Develop State Constitutional Law*, 1987 U. ILL. L. REV. 311, 350-51 (1987). The Court does this because, first, as a matter of federalism, the Court must consider the impact of its decisions (and those of the lower federal courts) on state courts or legislatures which are entitled to freedom of action in developing state law. *Id.* at 350-51 (citing William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) [hereinafter Brennan, *Individual Rights*]; Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1042-43 (1985) [hereinafter Utter, *State Court Comment*]).

Second, the Supreme Court is restrained in its constitutional interpretation because it is required to fairly formulate "uniform national standards of conduct." Lohruff, *supra*, at 350-51

authority, exercise that authority under different circumstances,<sup>47</sup> and often bring more relevant personal backgrounds to the process than do federal judges.<sup>48</sup> States, through their legislatures and courts,<sup>49</sup> serve as protective counterweights to federal power<sup>50</sup> by

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(citing Utter, *State Court Comment*, *supra*, at 1043; Note, *Developments*, *supra* note 4, at 1348-49); Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577, 612 (1989). Thus it tends to underenforce constitutional norms. Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1226-27 (1978) [hereinafter Sager, *Fair Measure*].

Third, Supreme Court jurisdiction is limited not only by the Constitution itself, but by federal statutes and a constraining, self-imposed federal law of justiciability. Lohrhaft, *supra*, at 350-51 (citing Utter, *State Court Comment*, *supra*, at 1044; Note, *Developments*, *supra* note 4, at 1348-49). "State courts which reject Supreme Court decisions and developing state law do not threaten the uniformity of interpretation of federal law because state courts relying on federal cases do not create federal law." Lohrhaft, *supra*, at 351.

47. See Howard, *Introduction*, *supra* note 14, at 934-40 (describing the state judge's role in making independent use of state constitutional law); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 403 (1987) [hereinafter Kaye, *Dual Constitutionalism*] (noting that each state by its own constitution may limit its powers as wisdom suggests); Linde, *E. Pluribus*, *supra* note 20, at 173, 181-83 (illustrating the difference between federal and state constitutional jurisprudence); Burt Neuborne, *Forward: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893-901 (1989) [hereinafter Neuborne, *Positive Rights*] (noting that some of these different circumstances include the text of the state constitution, other local circumstances, and the ease of the amendment process); Lawrence G. Sager, *Forward: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 973-76 (1985) [hereinafter Sager, *State Courts*] (noting the diversity among the states and the full exposure of state justices to local circumstances); Utter, *Freedom & Diversity*, *supra* note 39, at 494-96 (discussing the difference between state and federal constitutions); Williams, *Supreme Court's Shadow*, *supra* note 41, at 355, 397-402 (noting: (1) the different relative positions of the state and federal judiciaries in their respective systems; (2) the stronger position of the state courts vis-à-vis the state legislature and executive branches; and (3) the fact that state courts are closer to state affairs).

48. See, e.g., Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 39, 56 (1988) [hereinafter Kaye, *State Constitutional Law*] ("State courts are generally closer to the public, to the legal institutions and environments within the state, and to the public policy process. This both shapes their strategic judgments and renders any erroneous assessments they may make more readily redressable by the People.").

49. The Supreme Court, on a number of occasions, has explicitly encouraged initiative and experimentation under state constitutions. *E.g.*, *Massachusetts v. Upton*, 466 U.S. 727, 735 (1984) (Stevens, J., concurring); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *California v. Ramos*, 463 U.S. 992, 1031 (1983); *Montana v. Jackson*, 460 U.S. 1030, 1032 (1983); *South Dakota v. Neville*, 459 U.S. 553, 567 (1983) (Stevens, J., dissenting); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *Michigan v. Mosely*, 423 U.S. 96, 120-21 (1975) (Brennan, J. dissenting); *Oregon v. Haas*, 420 U.S. 714, 719 (1975); *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *Cooper v. California*, 386 U.S. 58, 62 (1967); *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940).

50. THE FEDERALIST NOS. 45 and 46 (James Madison). Of course, the balance historically sometimes seems to favor the exercise of federal power, but that in no way diminishes the importance or influence of developing state constitutional law. Once our early, agrarian society became a "national, high technology, industrialized society" after the ratification of the Fourteenth Amendment — and even more so after the "selective incorporation" of the federal Bill of Rights into the due process clause, and the revolutionary use of the Equal Protection Clause in the 1950s

acting as laboratories for experimentation.<sup>51</sup> While uniformity between federal and state criminal procedures may be desirable as a matter of practical law enforcement, "[w]hen weighed against the [state court's duty and] ability to protect fundamental constitutional rights, the practical need for uniformity can seldom be a decisive factor"<sup>52</sup> in state constitutional interpretation. As a result, state courts have a duty to develop their own higher constitutional standards to protect their citizens,<sup>53</sup> regardless of whether state-specific factors would support such divergence.<sup>54</sup> Indeed, they are justified in

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and 1960s — "power naturally shifted from the states to the federal government," including a presumed superior power to enforce civil liberties. Utter, *Freedom & Diversity*, *supra* note 39, at 641-42 (citing John M. Wisdom, *Forward: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063, 1078 (1984)); see also Phillip B. Kurland, *The Supreme Court, 1963 Term — Forward: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 145-62 (1964) (noting that the Warren Court worked an "egalitarian revolution"); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1084 (1985) [hereinafter Mosk, *Liberal and Conservative*] (detailing the rise in federal supremacy over state prerogatives). Given the increasing enforcement of the federal guarantees against state authority, state courts gave less and less serious consideration to state constitutional protection of civil liberties despite their traditional role as the primary protectors of individual rights. Utter, *Freedom & Diversity*, *supra* note 39, at 641-42 (citing Stanley Mosk, *The State Courts*, in AMERICAN LAW: THE THIRD CENTURY 212, 216 (B. Schwartz ed., 1976) [hereinafter Mosk, *State Courts*]; Todd F. Simon, *Independent But Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 KAN. L. REV. 305 (1985)). Even as early as 1910, the eminent scholar Walter F. Dodd had pronounced that:

[W]ith reference to the general guaranties of life, liberty and property, similar provisions will usually be found in both the state and federal constitutions. These state guaranties have, since the adoption of the fourteenth amendment, become mere surplusage, except in so far as they retard uniform judicial action by being interpreted more strictly by the state courts than similar federal provisions are interpreted by the federal courts. The need of state power to declare laws invalid on state constitutional grounds, as depriving of life, liberty, or property, or as depriving individuals of the equal protection of the laws, has entirely disappeared.

DODD, REVISION AND AMENDMENT, *supra* note 15, at 244-45 n.223.

51. See *supra* note 19 and accompanying text (discussing the idea of states as laboratories for experimentation).

52. Lohraff, *supra* note 46, at 350-51 (quoting *People v. P.J. Video*, 501 N.E.2d 556, 561 (1986)).

53. State courts are within their "rights" in construing their state constitutions more broadly than the federal Constitution. *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980); Paul G. Kauper, *The State Constitution: Its Nature and Purpose*, in CON-CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION 3 (1970) [hereinafter Kauper, *Nature and Purpose*]; Sager, *State Courts*, *supra* note 47, at 959; William F. Swindler, *State Constitutions for the 20th Century*, 50 NEB. L. REV. 577, 593-96 (1971). But see Wilkes, *supra* note 45, at 232-35 (noting that the modern role for state bills of rights seems to be reducing rather than expanding such rights).

54. See, e.g., *State v. Novembrino*, 519 A.2d 820, 856-57 (N.J. 1987) (construing the state constitutional protection against unreasonable searches and seizures to preclude recognition of the good faith exception to the exclusionary rule established in *United States v. Leon*); *State v. Hunt*, 450 A.2d 952, 960 (N.J. 1982) (Pashman, J., concurring) (noting that state courts should construe their state constitutions as they deem appropriate, taking into account numerous factors



engaging in independent interpretation<sup>55</sup> even where the relevant state constitutional wording is similar to the federal Constitution.<sup>56</sup> After all, independent interpretation of state documents serves no less a traditional function than educating the United States Supreme Court on the acceptability and practicality of expanding individual rights.<sup>57</sup>

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including United States Supreme Court decisions); *People v. P.J. Video*, 501 N.E.2d 556, 558 (N.Y. 1986) (noting that the New York constitution imposes a more exacting standard than does the federal Constitution for the issuance of search warrants authorizing seizure of allegedly obscene material); see also Lohrff, *supra* note 46, at 351-52 (noting that state courts do not need to explain divergences from federal law).

55. But see Tarr & Porter, *Introduction*, *supra* note 21, at 9. They write:

[The] more intensive [recent] scrutiny of state rulings [under the post *Long* analysis of adequate and independent state grounds doctrine] raises serious questions about whether state courts can develop constitutional principles without reliance on Washington and about what it means to interpret independently a state constitution in a federal system in which federal and state courts constantly influence each other.

*Id.*

56. See, e.g., Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among the State Supreme Courts*, 33 SYRACUSE L. REV. 731, 732, 764-93 (1982); Sager, *State Courts*, *supra* note 47, at 975-76; Williams, *Supreme Court's Shadow*, *supra* note 41; Note, *Developments*, *supra* note 4, at 1356-57.

57. Utter, *State Constitutional Law*, *supra* note 44, at 45-46 (citing *Project Report: Toward An Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 290 (1973) [hereinafter *Project Report*]). State courts have often been at the forefront in developing constitutional analysis in a variety of areas affecting individual rights, analysis which was later adopted by the Supreme Court. Through independent interpretation, state courts offer their insights on the development of federal constitutional law both before and after the Supreme Court decides an issue, and thus they aid in the development of that law. *Id.*; Utter, *State Court Comment*, *supra* note 46, at 1031-41. As Chief Justice Judith Kaye of the New York Court of Appeals commented:

Development of federal law through experimentation within the states has a long tradition. . . . The Supreme Court implicitly recognized this process [in] giving the exclusionary rule national [application. Subsequently,] the Supreme Court reversed its prior ruling on the discriminatory use of peremptory challenges [after state judicial experimentation. Three] Justices explicitly made known their interest in the issue, but said they preferred to allow it to percolate further in the state laboratories, to generate solutions upon which the Supreme Court might rely.

Kaye, *Dual Constitutionalism*, *supra* note 47, at 425-26 (citing *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, Blackmun, and Powell, JJ., concurring)). As Professor Elazar writes:

[E]ven where it has appeared to act radically, in many of the cases involving the apparent limitation of the states' powers [through the use of the Civil War Amendments during the past thirty years], the Court's decisions have come only after three-fifths of the states had individually adopted the same positions (at least in theory) on their own initiative. Until recently at least, in no important cases except [perhaps] those involving reapportionment have fewer than half the states been on the same side as the Court. This unstated (and perhaps unperceived) "three-fifths rule" can be seen as operative in the whole range of desegregation cases, in the Court's decision to disallow the use of illegally obtained evidence in state courts, in the . . . requirement that counsel be provided in all criminal cases, and in the prohibition of mandatory prayers and Bible-reading in the schools, to name only a few of the "landmark" cases of [the past 30 years]. It is possible to view these efforts to create more uniform standards as

State courts are able to engage in experimental interpretation because the constraints on state judges are quite different from those imposed on federal judges. The federal courts, guided by the Supreme Court, must consider — in addition to numerous other self-imposed institutional and justiciability restraints — what impact their decisions will have on federalism;<sup>58</sup> it would be illogical, however, for a *state* court to feel restrained by Supreme Court decisions resting on concerns over the preservation of the federal system.<sup>59</sup>

In addition, under state constitutions, most states' judges are either elected to the bench or subject to retention elections.<sup>60</sup> This

violations of the spirit of federalism that seeks to allow diversity to flourish within the nation, but it is also possible to argue that this unstated three-fifths rule serves to provide an opportunity for adjusting American legal ideas to changes induced by the continuing frontier in a manner consonant with the perpetuation of a dual legal system.

ELAZAR, *AMERICAN FEDERALISM*, *supra* note 20, at 173-74; *see also* Fischer, *supra* note 43, at 88 (discussing the use of "ballot propositions" to give the state judiciary feedback on its decisions); Utter, *State Constitutional Law*, *supra* note 44, at 47-48.

58. *See* NettikSimmons, *supra* note 19, at 280-81. He writes:

One feature of this concern of federalism is a mistrust about the degree of power . . . the United States Supreme Court [should] have over the lives of hundreds of millions of persons living in diverse geographical and cultural environments. Such responsibility requires that the Supreme Court proceed very cautiously in reviewing the acts of state governments before imposing a narrow rule upon the legislatures and agencies of fifty states. . . . [T]he diversity of the fifty states cautions against excessive federal judicial activism. [Individual] states, on the other hand, are significantly more homogeneous and state courts are responsible for far fewer persons, agencies, and inferior courts. Likewise, most states have requirements that state judges have practiced in the state before they can be appointed or elected to the bench. Further, in states . . . where there are regions — for example, urban and rural areas — with different political, cultural, and legal perspectives, there often is significant representation of those diverse areas on the appellate courts. Thus, it is possible for state judges to have more insight into the fiscal, administrative, political and cultural character of state government and to use this insight in responsive judicial review.

*Id.* (citations omitted).

59. Howard, *Burger Court*, *supra* note 19, at 941. Professor Howard provides an odd example of this: a state court, refusing to intervene in a student hair-length case, cited a United States Supreme Court opinion by Justice Hugo Black for the notion that the case raised a question "best left to the states." *Id.* (citing *Dunkerson v. Russell*, 502 S.W. 64, 65 (Ky. 1973)).

60. Most state court judges are elected or appointed for fixed terms. Braveman, *supra* note 46, at 609 (citing MARVIN COMISKY & PHILIP C. PATTERSON, *THE JUDICIARY — SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE* 9 (1987)). Furthermore, in the majority of states, high court justices are either elected initially or citizens vote periodically on the retention of appointed justices. Utter, *State Constitutional Law*, *supra* note 44, at 34 (citing Erick B. Low, *State of the Judiciary*, in 27 *BOOK OF THE STATES* 146, 157-73 (Council of State Governments ed., 1988-89)). "Most states adopted popular election of the judiciary in the mid- to late-nineteenth century, seeing it as a means to reinforce the credibility of judicial decision-making." *Id.* (citing Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 *AM. B. FOUND. RES. J.* 345, 346-47 [hereinafter

characteristic of state judiciaries avoids much of the antidemocratic nature of federal judicial review.<sup>61</sup> Indeed, because state citizens elect judges knowing that they will occasionally enjoin the actions of other elected officials, it has been argued that state judicial elections represent an attempt by state voters:

[T]o select persons of principle who in the heat of controversy will persuade the public to abide by the constitutional principles they have adopted for themselves. Thus, the election of judges, like the adoption of constitutional rights for individuals, expresses an affirmation of judicial review.<sup>62</sup>

Furthermore, state judges are part of a common law tradition in which state judiciaries actually "make" law in many fields.<sup>63</sup> This continuing common law tradition demonstrates not only public acquiescence in judicial law-making, but also that "at least where individual rights are concerned, state courts have the *institutional ability* and *legal resources* to construe state constitutions more broadly than the federal Constitution may be construed by federal courts."<sup>64</sup> Thus, the political benefits that flow from popular amendment of state constitutions, the unique place of state courts in the federal system, the relatively greater accountability of state judges and their unique and often superior qualifications to engage in judicial review, and the importance of state judicial review to the development of federal constitutional law make it clear that the growth of independent state constitutional law is both legitimate and important.

There are, however, two essential requirements for constitutional growth, either by textual amendment or through judicial review. First, even though other viable means of amending the inflexible federal Constitution have evolved — court decisions, for example<sup>65</sup>

Hall, *Popular Election*)).

61. NettikSimmons, *supra* note 19, at 278-80. *But see* Thomas M. Ross, *Rights at the Ballot Box: The Effect of Judicial Elections on Judges' Ability to Protect Criminal Defendants' Rights*, 7 LAW & INEQUALITY J. 107 (1988) (noting that judicial elections should be eliminated because they interfere with a judge's fairness and impartiality).

62. NettikSimmons, *supra* note 19, at 280.

63. Federal judges, on the other hand, "have had solely an interpretive function: they are charged with interpreting the Constitution, federal statutes, and federal regulations." *Id.* at 280 (citations omitted).

64. *Id.* (emphasis added); *see also* Shapiro, *supra* note 22, at 652 (noting that judicial review at the state level "involves a state judiciary in the assessment of matters within its own expertise [and judgments] . . . are far less likely to be criticized as antidemocratic checks upon the people's elected representatives or as involving policy determinations beyond the scope of judicial competence").

65. These evolved *informal* amendatory techniques — which in addition to judicial interpreta-

— amending articles in state constitutions must ensure a proper balance between constitutional stability and flexibility. The amendment and revision process in each state must be stringent enough to provide for continuity in social norms and political rights, but still flexible enough to allow government to meet new circumstances or solve modern problems;<sup>66</sup> i.e., legislative problem-solving through struc-

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tion include convention and usages, executive acts, amendment through disuse, and amendment by acquiescence — “testif[y] to the flexibility of this most adaptable instrument which would continue to be effective, even without its most awesome power, the power given in the amending article . . . .” Robert C. Weclaw, *The Constitution's Amending Article: Illusion or Necessity*, 18 DEPAUL L. REV. 167, 187 (1968); see also Levinson, *supra* note 11, at 422 (“Central to understanding the American government . . . is recognition, and concomitant assimilation, of the extent to which the Constitution has indeed been amended, been the subject of political inventiveness, by means other than the addition of explicit text.”) (citations omitted).

Thus, for quite a few years now it has been common to see in legal and political science literature, without references or attribution, comments such as: “[A] basic difference between the U.S. Constitution and the state constitutions [is that] federal constitutional law is changed primarily by acts of interpretation by the U.S. Supreme Court, the Congress, and the presidency [, while s]tate constitutional law is changed primarily by amendment, a procedure that usually involves voter participation.” John Kincaid, *State Constitutions in the Federal System*, in STATE CONSTITUTIONS IN A FEDERAL SYSTEM 13 (John Kincaid ed., 1988). It has been the accepted wisdom for some time “that judicial amendments are effective and obligatory methods of adaption to changing circumstances.” SUBER, *supra* note 9, at 199 (citing LESTER B. ORFIELD, AMENDING THE FEDERAL CONSTITUTION 214-15 (1942)). Nevertheless, there has always been an important difference between “interpretation” and “amendment”:

[The difference] is akin to that between organic development and the *invention* of entirely new solutions to old problems. From this perspective “interpretations” are linked in specifiable ways to analyses of the text or at least to the body of materials conventionally regarded as within the ambit of the committed constitutionalist. . . . [On the other hand, p]erhaps the simplest way of conceptualizing what we mean by an amendment is to describe it as a legal invention not derivable from the existing body of accepted legal materials.

Levinson, *supra* note 11, at 413-14 (citations omitted). For an excellent discussion of “judicial amendment” and its practical and theoretical ramifications, see SUBER, *supra* note 9, at 197-206, 415 n.3 (citing Fredric R. Coudert, *Judicial Constitutional Amendment, as Illustrated by the Devolution of the Institution of the Jury from a Fundamental Right to a Mere Method of Procedure*, 13 YALE L.J. 331, 364-65 (1904) (noting that if the amending clause becomes too difficult of a procedure, judicial amendment will become more prominent; but if judicial amendment becomes too prominent or easy, the foundation of our government — respect for the Constitution — will be sapped)). Professor Suber’s book is “a fairly complete compendium of the constitutional law relating to constitutional amendment . . . .” *Id.* at xix.

66. It has been argued that “procedurally arduous means of achieving constitutional change are preferable not only because they represent an accepted norm,” but for other reasons as well. Colantuono, Comment, *supra* note 16, at 1475 (emphasis added). A relatively inflexible constitution insures that “revisions reflect broadly shared concerns rather than the self-interest of the authors.” *Id.* at 1507. Also, inflexibility: (1) avoids the unintended consequences of haste by promoting deliberation; (2) promotes a stable state constitutional law and thus maintains a social consensus on values; and (3) makes “the adoption of provisions hostile to minority interests less likely by giv[ing] minority interests the opportunity to combat fear and prejudice with information and education.” *Id.* at 1509-11. The somewhat more neutral view is that:

Provisions regulating the time and mode of effecting organic changes are in the na-

tural and fundamental reform must be encouraged. To this end, ju-

ture of safety-valves — they must not be so adjusted as to discharge their peculiar function with too great facility, . . . nor, on the other hand, must they discharge it with such difficulty that the force needed to induce action is sufficient also to explode the machine.

JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 549; *see also* DEALEY, *supra* note 15, at 139 (noting that the ease of the amending process requires a balance between being flexible and unalterable); John Dickinson, *The Constitution and Progress*, 181 ANNALS AM. ACAD. POL. & SOC. SCI. 11, 12 (1935) ("The function of a written constitution is to provide . . . a principle and framework of order within which change can proceed without endangering stability."); Fellman, *supra* note 15, at 154-55 (concluding that the amending process should be more difficult than the ordinary legislative process, but not impossibly difficult, and that the central problem is finding a proper balance between stability and change) (citation omitted). As one scholar has noted:

[A] constitutional road to the decision of the people, ought to be marked out, and kept open, for certain great and extraordinary occasions. . . . [However,] frequent appeals would in great measure deprive the government of that veneration, which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability.

FEDERALIST NO. 49 (James Madison), *reprinted in* THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 199 (Michael Kammen ed., 1986) [hereinafter AMERICAN CONSTITUTION]. *E.g.*, Grad, *Function and Form*, *supra* note 15, at 972; Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 719-33 (1981). A number of the Founders and many of their contemporaries shared this view, believing that an article in the United States Constitution providing for amendments was desirable for two reasons. First, they had no illusion that the constitutional scheme was perfect for present circumstances, let alone for the needs of future generations. As George Washington wrote to his nephew, Bushrod Washington, who later served as an Associate Justice of the Supreme Court from 1798 to 1829:

The warmest friends and the best supporters the Constitution has, do not contend that it is free from imperfections; but they found them unavoidable and are sensible if evil is likely to arise there from, the remedy must come hereafter . . . and, as there is a Constitutional door open for it, I think the People (for it is with them to Judge) can as they will have the advantage of experience on their Side, decide with as much propriety on the alterations and amendments which are necessary [as] ourselves. I do not think we are more inspired, have more wisdom, or possess more virtue, than those who will come after us.

Letter from George Washington to Bushrod Washington (Nov. 17, 1787), *reprinted in* AMERICAN CONSTITUTION, *supra*, at 83.

Of course, the most eloquent expression of this view probably belongs to Thomas Jefferson:

Some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. . . . But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarious ancestors.

10 WRITINGS OF THOMAS JEFFERSON 42-43 (Paul L. Ford ed.) (New York, G. P. Putnam's Sons 1899) [hereinafter JEFFERSON WRITINGS]; *see also* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 202-03 (M. Farrand ed., 1911) [hereinafter RECORDS] (quoting the comments of George Mason); Linder, *supra*, at 719 (noting that delegates to the Constitutional Convention in Philadelphia believed that an article providing for Constitutional amendments was desirable).

Secondly, the Framers believed that a flexible constitution would provide the protection against revolutionary upheavals needed by a young and somewhat fragile government. *See, e.g.*, RECORDS,

dicial independence in expansive interpretation must also be encouraged. But what encourages independent constitutional analysis and expansive interpretation? It seems clear that state court judges are justified in doing so on occasion and that by doing so they serve an important function. But why does any *particular* state court construe a state constitutional provision independently and more expansively than similar provisions in the federal Constitution?<sup>67</sup> If it is easier politically to simply rely on federal nomenclature and standards even though all state courts have the authority to engage in expansive interpretation of their own provisions, then what accounts for the significant advance of the new federalism in some but not other jurisdictions?<sup>68</sup>

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*supra*, at 202-03 (noting the comments of George Mason); Linder, *supra*, at 719. Thus, Article V is itself *so* necessary that it should not be amended to create any new limitations on the amending power. It would not be in the interest of democracy to allow one generation to prevent succeeding generations from making fundamental political and moral choices. See Linder, *supra*, at 732; see also CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY*, 145-46 (4th ed. 1968) (discussing "the political effect of depriving the amending power of some part of what is its essential function"); SUBER, *supra* note 9, at xiv (arguing that the law cannot tolerate a state's attempt at enacting laws that effectively provide that "this rule may not be changed"); CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 673 (1937) (noting the necessity of the amending process).

The amending clauses of most state constitutions, however, have themselves been amended numerous times. SUBER, *supra* note 9, at 20. "[S]elf-amendment [, that is, use of amending clauses to amend amending clauses,] may well be a strict self-contradiction, but the evidence of legal history suffices to show its lawfulness even in the face of logical doctrine. . . . [The] only alegal source of legal authority is social practice, not normative principles from morality or logic." *Id.* at xii.

67. See, e.g., Lohraff, *supra* note 46, at 347 ("All state courts are faced with the dilemma [of] . . . whether to diverge solely because of dissatisfaction with a Supreme Court case curtailing criminal procedure rights or to accede to the Supreme Court's view if no state-specific or interpretive evidence supports a decision to diverge.").

68. Utter & Pitler, *supra* note 38, at 638 ("[T]he majority of states have a low level of state constitutional rights litigation."). As of 1982, there were only fourteen states having a moderate or better reputation for protecting civil liberties under their state constitutions. G. Alan Tarr & Mary Cornelia Porter, *Gender Equality and Judicial Federalism: The Role of State Appellate Courts*, 9 HASTINGS CONST. L.Q. 919, 953-54 (1982) [hereinafter Tarr & Porter, *Gender Equality*] (noting that these states were Alaska, California, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Washington, and Wisconsin). By 1985, Justice Shirley Abrahamson of the Wisconsin Supreme Court would suggest adding four more states, for a total of eighteen. Abrahamson, *Criminal Law*, *supra* note 19, at 1181 (suggesting the addition of Arizona, Mississippi, New Hampshire, and Vermont). Some states, however, "have virtually no record of reliance on their state constitutions so that large sections of the country, including the Midwest, remain largely unaffected by the growing trend toward development of independent state constitutional jurisprudence." Utter & Pitler, *supra* note 8, at 638 (noting that of 311 actual cases decided since 1950 on independent state constitutional grounds, the Midwest accounted for only 6.8 percent) (citation omitted). As Professors Tarr & Porter have observed: "Whether the new judicial federalism represents a short-term response by some courts to a particular set of historical circumstances or a major long-term shift in the locus of responsi-

## II.

There are some answers to these questions. Intuitively, one might assume that most state courts feel that the minimal criminal procedural rights articulated by the federal courts are deemed more than sufficient by the state citizens in most states and therefore judges in those states are simply responding to popular opinion. However, in the last twenty to thirty years, no doubt catalyzed by the conservative trend on the United States Supreme Court on the subject of criminal procedure,<sup>69</sup> there has been growing interest in many state courts concerning the use of state constitutions not only as independent sources for individual rights, but as sources for *greater* individual rights than those presently protected by the federal Constitution.<sup>70</sup> For some reason, these state courts are not only sensitive to their legitimate anti-majoritarian function, but feel free to take the political risks that flow from developing an independent state individual rights jurisprudence.

Some scholars argue that it is not appropriate for state courts to engage in expansive interpretation; that such activism is reactionary,

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bility for the protection of civil liberties remains to be seen." Tarr & Porter, *Introduction*, *supra* note 21, at 7.

69. The interest in the possibility of expanding state constitutional protection was primarily a response to Burger Court conservatism. See, e.g., Brennan, *Individual Rights*, *supra* note 46, at 489; Jerome B. Falk, Jr., *The State Constitution: A More Than "Adequate" Non-Federal Ground*, 61 CAL. L. REV. 273, 284-85 (1973); Howard, *Introduction*, *supra* note 14, at 873; *Project Report*, *supra* note 57, at 271. But it was also a response to those who have criticized state courts for ignoring state constitutions as a source of constitutional law independent of federal court developments. See, e.g., Scott H. Bice, Anderson and the Adequate State Ground, 45 S. CAL. L. REV. 750 (1972); Hans A. Linde, *Without Due Process: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970) [hereinafter Linde, *Without Due Process*]; Swindler, *supra* note 53; see also Gardner, *Failed Discourse*, *supra* note 14, at 812-14 (arguing that state constitutions provide states with powers separate and distinct from the federal Constitution).

70. Shirley S. Abrahamson, *Homegrown Justice: The State Constitutions*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 317-35 (Bradley D. McGraw ed., 1985) [hereinafter Abrahamson, *Homegrown Justice*] (bibliography); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *Guardians of Individual Rights*]; Brennan, *Individual Rights*, *supra* note 46, at 489; Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 317-18 (1986); Ronald K.L. Collins et al., *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599, 599 [hereinafter Collins et al., *State High Courts*]; Vern Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Peter R. Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 11 (1988); Sager, *State Courts*, *supra* note 47, at 959; Note, *Developments*, *supra* note 4, at 1324; Ronald K.L. Collins, *Looking to the States*, NAT'L L.J., Sept. 29, 1986, at S-2 [hereinafter Collins, *Looking to the States*].

result-oriented, pragmatic, and unprincipled.<sup>71</sup> Most scholars, however, appear convinced of the legitimacy and importance of independent analysis. They point to several reasons why levels of protection for individual rights under state law ought to differ from the properly circumspect federal view of least intrusive uniform national standards.<sup>72</sup> But if they are correct, why has expansive interpreta-

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71. E.g., *State v. Hunt*, 450 A.2d 952, 963 (1982) (Handler, J., concurring); George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor — Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L. Q. 975, 994-95 (1977); Maltz, *supra* note 42, at 995; Teachout, *supra* note 70, at 34; Steven J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New "Rights" in State Constitutions*, 21 ARIZ. ST. L.J. 1005 (1988). But see Ronald K.L. Collins, *Forward: The Once "New Judicial Federalism" and Its Critics*, 64 WASH. L. REV. 5, 5-18 (1989) [hereinafter Collins, *New Judicial Federalism*] (summarizing several reasons why critics of expansive state court interpretation provide analytically deficient arguments). Such activism seems reactionary, it has been suggested, because the expansive decisions rarely seem adequately justified. This, according to some, is because of the failure of the fundamental premise of state constitutionalism "that a state constitution . . . reflects the [presumably unique] fundamental values, and . . . character" of the people of the state — a premise said to be no longer in accord with reality. Gardner, *Failed Discourse*, *supra* note 14, at 813-18. This argument is not fully convincing, however, because state constitutionalism may not really reflect the premise Gardner suggests it does, namely that "values" will differ significantly from state to state. The better view of why there is independent and expansive decision-making is that, under appropriate circumstances, similar values will have *relatively* different importance to the citizens of some states. When these values — manifested in part through unique state histories, traditions, demographics, political cultures, and other local conditions — are then *balanced* against state interests which are more or less compelling in different states, local differences will produce different results.

History captures not only the events within a state, but their impact on the *spirit* of the people responding to those events. For an analysis of the use of history in United States Supreme Court opinions, see CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY 190-91* (1969). Independent interpretations of state constitutions may properly rely on the unique traditions that shaped local values, even if those local values are similar to values held nationally. Judith S. Kaye, *A Midpoint Perspective on Directions in State Constitutional Law*, 1 EMERGING ISSUES ST. CONST. LAW 17, 23 (1988) [hereinafter Kaye, *Midpoint Perspective*] (stating "[w]here the state's history indicates some special concern, clearly there might well be a different result" in the balancing); see also *Right to Choose v. Byrne*, 450 A.2d 925, 934 (1982) (finding expanded protection for poor women seeking medically necessary abortions by relying on the long-standing New Jersey tradition of according *high priority* to the preservation of health); ELAZAR, *AMERICAN FEDERALISM*, *supra* note 20, at 10-21 (discussing the different ways states respond to the needs of society); Bartley, *supra* note 25, at 23-24 (noting that state constitutional change occurs to a great extent through interpretation and informal state processes); Bravemen, *supra* note 46, at 606 (discussing the state courts' use of tradition to justify a departure from the federal approach); Note, *Constitutional Change*, *supra* note 33, at 999-1000 (discussing several factors which interact to determine whether judicial interpretation in a state will be static or will manifest constitutional change).

72. See, e.g., Kaye, *Midpoint Perspectives*, *supra* note 71, at 17; Linde, *Without Due Process*, *supra* note 69, at 125, 133-35; Utter, *Freedom and Diversity*, *supra* note 39, at 239. But see Gardner, *Failed Discourse*, *supra* note 14, at 818 ("[T]he notion of significant local variations in character and identity is just too implausible to take seriously as the basis for a distinct [state] constitutional discourse."); Maltz, *supra* note 42, at 1022 (noting that state legislatures already tend to enact laws which are consistent with the fundamental values of state citizens).



tion of state constitutions been common in no more than eighteen states?<sup>73</sup> Three factors are commonly advanced as influencing independent and expansive judicial interpretation of state constitutions: (1) the mode of judicial selection, (2) the relative ease of amending a state's constitution, and (3) the existence of a "political culture" in the state sympathetic to such interpretation.<sup>74</sup> These variables are not of equal import and the nature of their impact is not fully understood.

For example, there has long been a debate over whether "popular elections" rather than "appointment" of state judges will more effectively tend to encourage expansive interpretation. But the fact that state judges are subjected to popular election and are thus more accountable than judges at the federal level is "a dubious ground on which to argue for greater state court activism."<sup>75</sup> Indeed, judges are rarely held accountable at the ballot box for engaging or failing to engage in "independent interpretation."<sup>76</sup> The impact of occasional elections on a state judge's inclination toward state constitutionalism would seem negligible one way or the other, at least in

73. "[T]he relation between the nature of state constitutionalism and approaches to constitutional interpretation remains a crucial issue in state constitutional law." Tarr & Porter, *Introduction*, *supra* note 21, at 6; see also *supra* note 68 and accompanying text (listing the states that have used their state constitutions to expand individual rights).

74. Otherwise, where there is a consensus on a high court as to "goals, tasks and methods," and a general belief that the role of the state court is to serve as an "inferior tribunal" to the U.S. Supreme Court, high courts will only rarely invoke adequate and independent state grounds. SUSAN P. FINO, *THE ROLE OF STATE SUPREME COURTS IN THE NEW JUDICIAL FEDERALISM* 19-20 (1987) (citing Edward N. Beiser, *The Rhode Island Supreme Court: A Well-Integrated Political System*, 8 LAW & SOC'Y REV. 167 (1974); Neil T. Romans, *Of State Supreme Courts in Judicial Policy-Making: Escobedo, Miranda, and the Use of Judicial Impact Analysis*, 27 WEST. POL. Q. 38 (1974)).

75. Howard, *Introduction*, *supra* note 14, at 939-40 n.348. Many commentators have argued that, precisely because of a lack of political isolation, state judges are less likely to strive for greater protection for the individual rights of the politically powerless. *E.g.*, *Report of the ABA Commission on Professionalism*, 112 F.R.D. 243, 293 (1986) ("[J]udges are far less likely to . . . take . . . tough action if they must run for reelection or retention every few years."); Brennan, *Guardians of Individual Rights*, *supra* note 70, at 551 ("[S]tate court judges are often more immediately 'subject to majoritarian pressures than federal courts, and are correspondingly less independent than their federal counterparts.'"); Paul Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1359-60 (1970); Howard, *Burger Court*, *supra* note 19, at 941 n.354; Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127-28 (1977).

76. See, *e.g.*, Utter, *State Constitutional Law*, *supra* note 44, at 41-44 (discussing electoral challenges to judges engaged in independent interpretation and concluding that the "infrequent rejection" of these judges "may fairly be considered a ratification of the independent decisions"). The reaction of the electorate to activist judges more often than not reflects public sentiment about crime and capital punishment, rather than ratification of independent high court decision-making. Collins et al., *State High Courts*, *supra* note 70, at 622-23.

states where judges are not insulated from the political process.<sup>77</sup> Professor Kenneth Karst has pointed out that it makes no difference whether judges are elected or appointed; it is their "independence" that matters:

The reason for the consistent noninterventionist record of Virginia's judges [in interpreting the state constitution] is not hard to find. Judges in Virginia are appointed *and reappointed* by a majority vote of each house of the legislature. It is the regular pattern for the members of each house to hold party caucuses on questions of judicial appointments. Such a system does not encourage doctrinal trailblazing among judges, who must be acutely aware of their personal accountability for new concepts or novel interpretations. . . .

In contrast, it is no accident that the justices of the California Supreme Court, who have been so receptive to the development of state constitutional guarantees, are selected under the Missouri Plan. Judicial independence — certainly the kind of independence needed if a state court is to give life to its state constitution . . . is rooted in sand when the legislature can decide in its discretion whether to reappoint a judge who has voted to limit its power.<sup>78</sup>

Scholars have also raised the question of "whether the ease of amending the state constitution affects the manner of interpreting the state constitution."<sup>79</sup> The possibility that the political process in a state can be easily marshalled to change constitutional text directly would seem quite relevant to any judicial inclination to develop independent and expansive state constitutional law.<sup>80</sup> State amendment procedures which can facilitate popular reaction to judicial decisions might offer something of a challenge to judicial independence.<sup>81</sup> Yet such procedures clearly provide a much better op-

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77. See *supra* note 74 and accompanying text (noting reasons for expansive judicial interpretation).

78. Kenneth L. Karst, Book Review, *A New State Constitution: Of Independent State Grounds and Independent State Judges*, 28 STAN. L. REV. 829, 834-35 (1976); see also FINO, *supra* note 74, at 13 (noting that the higher the degree of judicial independence from the political branches, the greater the degree of judicial activism) (citing JOHN R. SCHMIDHAUSER, *JUDGES AND JUSTICES: THE FEDERAL APPELLATE JUDICIARY* (1979)); Collins et al., *State High Courts*, *supra* note 70, at 612 (noting that judicial independence may account for the fact that, "contrary to expectations, justices in western moralistic states who are linked to voters either by direct election or retention elections [nevertheless] have been among the leaders in developing state constitutional rights law"). But see FINO, *supra* note 74, at 20-21 (positing that an appointive system holds more promise for qualified judges more likely to develop an independent body of state law than an elective system, given the minimal amount of information the average voter possesses about the candidates).

79. E.g., Abrahamson, *Homegrown Justice*, *supra* note 70, at 308.

80. Note, *Constitutional Change*, *supra* note 33, at 999-1000.

81. May, *supra* note 11, at 170 ("Characterized by mechanisms that invite popular and political influence and frequent change, state [amendment] procedures pose a challenge to the indepen-

portunity than that presented at the federal level for garnering direct popular support for newly articulated rights and liberties while reinforcing the notion of judicial accountability.<sup>82</sup> Professors Tarr and Porter have observed that it is not clear which way this cuts in practice:

[S]hould the relative ease of constitutional amendment mean that state judges should feel free to pursue an activist course, recognizing that the people can readily respond to judicial initiatives through amendments? Or, does the ease of amendment suggest that constitutional provisions should be interpreted narrowly, since the people of the state remain free to grant new powers or award new rights whenever they deem it desirable?<sup>83</sup>

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dence of the judiciary in the development" of individual rights under a state constitution); *see also* Howard, *Burger Court*, *supra* note 19, at xx-xxi (noting that in states which have the initiative, ease of revision seems to threaten experimental interpretation of their bills of rights).

82. May, *supra* note 11, at 170. To some extent, the state amendment process seems to have limited individual rights. *Id.* at 171. There has nevertheless also been much "buttress[ing] of the individual rights edifice." *Id.* (citing Ronald K.L. Collins, *Forward: Reliance on State Constitutions — Beyond the New Federalism*, 8 U. PUGET SOUND L. REV. xii (1984) [hereinafter Collins, *Forward*]). The new judicial federalism "has also brought with it a social consciousness that recognizes the importance of measures that reinforce rights." *Id.* Actually, "except for criminal justice and certain racial questions, the voters either support or leave other civil rights alone." *Id.* (citing Fischer, *supra* note 43, at 69-70). Professor Shapiro believes that:

It is a mistake to assume that these mechanisms for maintaining the responsiveness of state constitutional law will manifest themselves in an automatic popular reaction against the expansion of individual rights. With regard to the criminal process, the most significant popular repudiations of constitutional policy have been amendments focusing upon the restoration of capital punishment and the scope of the exclusionary rule. [citations omitted]. In light of the wide range of judicial developments in this area, such efforts have been relatively infrequent. Few issues excite a polarization of opinion as do these, and electorates are capable of differentiating between the merits of a particular policy and a generalized animus against acknowledging the rights of the accused. [citations omitted]. It would be presumptuous indeed to suppose that a state court's approach to problems like [reinforcing a suspect's right to refuse to consent to a search] or its independent view of prosecutorial abuse in the courtroom would be greeted by popular indignation.

To the contrary, there is every indication that the prizing of self-government and the appreciation of diversity that underly our state constitutional provisions are widely shared, and the notion of local sovereignty over significant aspects of our individual freedoms remains a source of pride and promise.

Shapiro, *supra* note 22, at 654-55.

83. Tarr & Porter, *Introduction*, *supra* note 21, at 6. Some commentators feel judicial activism is fostered by the knowledge that the public can "correct" inappropriate decisions. *See, e.g.*, Commonwealth v. O'Neal, 339 N.E.2d 676, 694 (Mass. 1975) (Hennessey, J., concurring); Robert D. Brussack, Note, *Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533, 562 (1976); Galie, *supra* note 56, at 791-92; Howard, *Burger Court*, *supra* note 19, at 939-40; Note, *Counterrevolution in State Constitutional Law*, 15 STAN. L. REV. 309, 330 (1963) [hereinafter Note, *Counterrevolution*]. But *see* Collins, *Forward*, *supra* note 82, at 17 n.62 (noting one judge's hesitancy to rely on a state constitution for fear of being overruled by constitutional amendment); Mary Cornelia Porter, *State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation*, in STATE SUPREME COURTS: POLICY-

What is fairly clear is that neither ease of amendment nor judicial elections — not even both of them occurring in the same state<sup>84</sup> — comes close to fully explaining the recent national experience with independent and expansive state constitutional interpretation. Then why does the possibility of desirable and easy “democratic input”<sup>85</sup> into the judicial decision-making process (such as voting for judges or for amendments reversing their decisions) seem to coincide with activist inclinations in only *some* state courts?<sup>86</sup> It may be because something more than the reassurance of their own ultimate accountability or the potential for popular approval through amendment is required to motivate potentially “active” jurists. What seems to be needed is a strong judicial perception that any democratic input genuinely reflects the popular will rather than mere partisan politics. This will be the case only if there is a sufficient measure of independence from the political branches and fair, reasonable, and regular opportunity for popular participation in constitutional amendment or revision. This state of affairs would most likely create a climate conducive to independent judicial interpretation. But what factors encourage or discourage expansive interpretations of individual rights provisions?

The final variable having an influence on state constitutionalism has the advantage of not only suggesting what may encourage *independent* interpretation, but accounting for *expansive* interpretation as well: the arguably unique “political culture” of each state.<sup>87</sup> In

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MAKERS IN THE FEDERAL SYSTEM 3, 10 (Mary Cornelia Porter & G. Alan Tarr eds., 1982) (expressing fear of institutional damage to the judiciary through the politicization of its decision-making). It is also important to note that there may be a great deal of difference in a given state between the permissible level of activism in criminal procedural rights as compared to educational funding, environmental policy, or privacy rights for the “non-criminal” population.

84. See, e.g., Utter, *State Constitutional Law*, *supra* note 44, at 44-45. Justice Utter writes:

At one extreme is California, with its amendment initiatives and willingness to remove unpopular justices, creating a possible “chill” on judicial independence. New Hampshire, at the other end, appoints each justice for a term that ends on his or her 70th birthday and requires a super-majority legislative and popular vote to amend the constitution. Along this continuum lies an ideal balance of democracy and independence.

*Id.* (citations omitted).

85. *Id.*

86. See *supra* note 68 and accompanying text (listing the states that have used their state constitutions to expand individual rights).

87. State constitutional development and interpretation are affected by the political culture of each state. Elazar, *State Constitutions*, *supra* note 15, at 17 (citing Samuel C. Patterson, *The Political Cultures of the American States*, in PUBLIC OPINION AND PUBLIC POLICY 275-92 (Norman R. Luttbeg ed., 1968)). To a large extent, the various states share a common political culture. However, “there would appear to be three major political sub-cultures in the country —

1966, Professor Daniel J. Elazar suggested that:

[A] state's social and economic diversity will affect the degree of internal unity of the state and the general relationship between the state and the federal government: the greater the degree of internal unity, the greater the state's ability to resist "outside encroachment" from the federal government. State internal unity is a function of the degree of intrastate sharing of patterns, norms and policy interests considered in relationship to the degree of state deviation from national patterns, norms and policy interests. [Thus,] socioeconomic diversity within a state will have an adverse effect on internal unity and, consequently, make the state less equipped to fend off "federal encroachment." . . . [It is possible, however,] that a state with high internal unity can successfully avoid the impact of decisions of the federal Court "if they can bring courts, prosecutors, police, and the bar together at the state level and in the state's communities in common agreement as to how the individual's basic rights are to be protected under the state's scheme." In sum, socioeconomic diversity is related to the degree of state internal unity, and state internal unity, in turn, affects the general relationship between the state and the federal government.<sup>88</sup>

At present, there is only limited support for Elazar's hypothesis.<sup>89</sup> Nebraska and Arizona, for example, are highly "unified" states, but their courts rarely invoke the doctrine of adequate and independent state grounds to preserve state constitutional rulings against "federal encroachment."<sup>90</sup> On the other hand, "diversified states, such as Michigan and New Jersey, more frequently [rely] exclusively upon

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individualistic, moralistic and traditionalistic — rooted in the particular constellation of ethnic and religious groups and socioeconomic conditions which make up each state." *Id.*

88. FINO, *supra* note 74, at 6-8 (citing ELAZAR, *AMERICAN FEDERALISM*, *supra* note 20, at 13); see also Collins et al., *State High Courts*, *supra* note 70, at 607-10 (suggesting that "variations in state constitutional litigation in individual rights cases may . . . be associated with political culture") (citing Gregory Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 187-88 (Mar. 1985)). Professor Elazar writes:

[T]here exists a wide range of issues in which the dominant interests in any state can act as if they had statewide consensus behind them . . . [and] . . . a wide variety of ways in which each state . . . can capitalize on its potential for internal unity in the face of outside pressure. . . . While the extent to which a state possesses internal unity of purpose varies from issue to issue, there are some guidelines by which to assess the probable degree of internal unity. These include:

- A. The degree of overall state deviation from national patterns and norms.
- B. The degree of intrastate sharing of common patterns and norms.
- C. The degree of overall state deviation from national policies and interests.
- D. The degree of intrastate sharing of common policies and interests. . . .

The more all four factors are intensified . . . , the greater the likelihood of intra-state unity vis-à-vis the outside world . . . .

ELAZAR, *AMERICAN FEDERALISM*, *supra* note 20, at 10-13.

89. FINO, *supra* note 74, at 111.

90. *Id.*

state law.”<sup>91</sup> If there *is* any correlation between “internal unity” and independent state constitutional interpretation, it may be in states with “distinctly judicial sources” of internal unity of purpose<sup>92</sup> and “moralistic” political cultures rather than “individualistic” or “traditionalist” cultures.<sup>93</sup>

Consequently, if the courts of a given state exhibit a high degree of independence in state constitutional interpretation and frequently invoke the doctrine of adequate and independent state grounds to

91. *Id.*

92. Among, say, all those engaged in law enforcement and the protection of individual rights.

93. FINO, *supra* note 74, at 9-11; Collins et al., *State High Courts*, *supra* note 70, at 607-10. According to Elazar, three forms of political culture are important to federal-state political relationships:

(1) [T]he set of perceptions of what politics is and what can be expected from government held by both the general public and the politicians; (2) the kinds of people who become active in government and politics, as holders of elective offices, members of the bureaucracy and active political workers; and (3) the active way in which the art of government is practiced by citizens, politicians and public officials in light of their perceptions. . . .

The political culture of a particular state embodies both elements of American political culture — the concept of the marketplace, the idea of bargaining and rational self-interest; and the concept of commonwealth, the ideal of community interest in the best government to implement shared moral principles — to varying degrees. In the individualistic . . . culture, the emphasis is on marketplace values, the triumph of private concerns over community interests. . . . Politics is perceived as another form of professional business activity . . . [In Individualistic] cultures [one] would expect to find career judges who are well salaried, . . . [complicated with] judicial selection via partisan election . . . a highly bureaucratized state court system . . . [and] government . . . [serving] as referee among many competing individual interests, not . . . implement[ing] any broad policy of the public good. . . . [L]itigation rates in [Individualistic] cultures will be relatively high, . . . [with] challenges to economic regulation . . . .

Unlike the Individualistic . . . culture, the Moralistic . . . culture emphasizes the commonwealth — the ideal of a common good and a public interest. . . . Government is not left to the professional politician; instead it is the duty of every citizen. [One might expect] fewer career judges . . . and lower . . . salaries. There is little tolerance of corruption . . . and political party regularity is not important. [There would likely be] merit . . . or nonpartisan [judicial] election[s] . . . . Government intervention is expected for the sake of the public good . . . . Therefore, [one] would not expect challenges to the *scope* of government regulation in the courts. Instead, there will be challenges to the *nature* of regulation because the conception of . . . the public good [changes] from era to era. . . .

[T]he Traditionalistic [Political Culture] features “ambivalent attitudes toward the marketplace combined with a paternalistic and elitist conception of the commonwealth[;]” . . . [a] hierarchical [society where] maintenance of [the] hierarchy [is the role of government, not] imposition of equality. It “confine[s] real political power to a relatively small and self-perpetuating group drawn from an established elite.” [It] is “instinctively anti-bureaucratic” because . . . “bureaucracy interferes with the fine web of informal personal relationships that lie at the root of the political system.”

FINO, *supra* note 74, at 9-11 (emphasis added) (citations to Elazar’s work omitted).

evade federal judicial review, that state will tend to have some predictable political characteristics. There will be a relatively independent judiciary; one less directly responsible to the political branches for their nomination yet more accountable to the voters themselves for their election to the bench (or, under the "Missouri Plan," retention).<sup>94</sup> This allows for the election of intellectually dominant justices who can lead the court toward independent analysis. There will also be flexible, open, and regular opportunities for popular participation in state constitutional amendment; this would be welcomed by such justices. An environment in which popular consent to (or distaste for) court decisions about the relative importance of individual rights may genuinely find expression encourages independent expansive constitutional interpretation. It does so because this environment makes it clear to state courts that there is local consensus about the independent political role of courts. In those cases where amendments are not initiated to reverse philosophical sea-changes and justices are then reelected, such retention represents a tacit approval of judicial exercise of that independent role, especially regarding questions peculiarly amenable to judicial leadership.

In contrast, where a state court has little if any record of engaging in independent interpretation, one might also expect to find a number of specific conditions in that state, including: (1) a judiciary closely dependant on the partisans of the political branches for their positions and judicial resources; (2) rigid, difficult, and limited opportunities for popular participation in constitutional amendment; and (3) a highly factious citizenry which possesses a popular fear and mistrust of "majority rule" or "direct democracy" as a basis for fundamental constitutional change. This antipathy toward facile change — especially through textual amendment but impliedly by judicial or nonformal amendment as well — would be expected in a state with an historic tradition of continual intense contention among widely divergent factions over divisive local issues. Such a political climate carries with it the constant threat of social turmoil and economic disruption should the existing constitutional order be disturbed too readily by some momentarily powerful faction. This fear is especially strong where the numerous compromises that most every constitution represents have been arrived at only with great difficulty, and after a careful but tenuous balancing of interests. In

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94. See *infra* note 100 and accompanying text (describing the three main elements of what is now commonly called the "Missouri Plan").

such a state, it would seem prudent for the courts to implement a philosophy of judicial restraint consistent with the sense of social stability required by that state's uniquely disunified, individualistic political culture. Such restraint would be politically defensible as responsive to the popular will in matters of fundamental change. But how do state courts gauge the popular attitude with regard to fundamental change?

The historic basis for what consensus exists on the subject of constitutional change are most likely to be reflected in the legal history of state constitutional *self-amendment*. This is the process through which the state constitutional amending provisions — and the judicial interpretations of those provisions — amend or revise the amendment process itself.<sup>95</sup> The nature of the political environment will determine the popular inclination toward change, and this inclination becomes manifest through self-amendment.<sup>96</sup> Nonuse of

the mechanisms of legal change, especially the supreme power of constitutional amendment . . . might reveal a certain contentment with the un-amended constitution . . . [and a lack of popular consent to change if] the procedure is fair. . . . But to change the fairness and difficulty of the amending procedure are virtually the only reasons to amend the amendment clause. Hence, self-amendment will almost always affect our ability to assess the people's consent to be governed by their constitution and the people's power to alter legal conditions to meet their consent.<sup>97</sup>

The absence of a reasonable and regular opportunity for constitutional amendment is usually apparent to state judges; they tend to be familiar with the politics, common law, and constitutional history

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95. See generally SUBER, *supra* note 9, at 11-14 (discussing the paradox of a state constitution's self-amendment process).

96. Professor May notes:

Interest in amendments has often been in arid legality rather than in political realities. There has been insufficient recognition that controversy over the amendment process is a function of something else, a commitment for or against a governmental policy in social, economic, or political matters. If a given amending *procedure* is deemed more or less likely to result in a certain amendment, proposal or ratification, then the attitudes about *process* have an anchor in *policy* preference.

May, *supra* note 11, at 167 n.59 (quoting CLEMENT E. VOSE, CONSTITUTIONAL CHANGE: AMENDMENT POLITICS AND SUPREME COURT LITIGATION SINCE 1900, at 342 (1972)). However, if the development of ultimate policies is traditionally contentious and difficult, the voters become wary of change and prefer an element of permanence in their state constitutions. *Id.* at 168 (citing Albert L. Sturm & Janice C. May, *State Constitutions and Constitutional Revision: 1980-81 and the Past 50 Years*, in 24 THE BOOK OF THE STATES 115, 121 (COUNCIL OF STATE GOVERNMENTS ed., 1982-83)); Cornwell, *Constitutional Tradition*, *supra* note 28, at 30. The conservative attitude is even stronger where there is popular satisfaction generally with existing government institutions. DODD, REVISION AND AMENDMENT, *supra* note 15, at 140-41 n.29.

97. SUBER, *supra* note 9, at xv.



of their states.<sup>98</sup> They function within state court systems where, unlike the federal courts, the judiciary is dependent on and responsible to the party structure within the political branches for their positions and resources.<sup>99</sup> Therefore, many state judges are naturally reluctant to usurp sovereign power or intrude into matters of public policy by engaging in expansive interpretation. The leadership of the state political parties will usually wish to decide public policy and design the political or constitutional compromises in their states for themselves. The function of judges in states without relatively independent judiciaries (states noted for close party control over judicial nomination and retention), therefore, is essentially to referee private conflicts rather than to deviate from the political and social status quo initially established (constitutionally) and maintained by the party that sponsors a judge in the first place.<sup>100</sup>

A difficult process for state constitutional amendment is perhaps the single most important signal to the judiciary. It directly impedes constitutional reform which could thereby increase the independence

98. See *supra* notes 47-48 and accompanying text.

99. See generally SCHMIDHAUSER, *supra* note 78 (noting that the higher degree of judicial independence from the political branches, the greater the degree of judicial activism). There seems to be no significant difference in activism between those judges who are appointed as compared to those who are elected. Collins et al., *State High Courts*, *supra* note 70, at 610-12. Yet party identification is a very strong factor in voting patterns in judicial elections, even in *nonpartisan* elections. See, e.g., Lawrence Baum, *Explaining the Vote in Judicial Elections: The 1984 Ohio Supreme Court Elections*, 40 W. POL. Q. 361, 369 (1987). Thus it is the relative independence from the political branches (not from the voters) that accounts for judicial activism. The lesser the degree of judicial independence, the lesser the degree of judicial activism in state supreme courts. FINO, *supra* note 74, at 13; see also *supra* notes 75-78 and accompanying text (discussing the idea that independent judges tend to be more activist).

100. On the close relationship between party affiliation and judicial policy, see PHILIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* 20-35, 137-77 (1980). Onslow Peters, a delegate from Peoria to the 1847 Illinois Constitutional Convention who strongly advocated an appointive system of selecting judges, stressed the importance of an independent judiciary in asking:

[W]ould you trust a man on your bench whose very office, whose salary, whose means of living, and the very bread for his wife and family, may depend on the decisions he will make — when he, if he offend that power or that party which put him in office, knows and feels he will be by them put out again?

ARTHUR C. COLE, *THE CONSTITUTIONAL DEBATES OF 1847*, at 460 (1919). This sense of dependence might diminish should the public choose to implement the "Missouri Plan," developed in 1913 by Professor Albert Kales of Northwestern University Law School. The three main elements of the plan in its present incarnation are: (1) the nomination of judicial candidates by a nonpartisan commission, comprised of both lay persons and lawyers; (2) appointment by the governor from a nominee list submitted by the commission; and (3) a short probationary period, in many instances no more than one year, followed by a nonpartisan retention election. ANTHONY CHAMPAGNE & JUDITH HAYDEL, *INTRODUCTION TO JUDICIAL REFORM IN THE STATES* 7 (Anthony Champagne & Judith Haydel eds., 1993).

of the state's judiciary. In most states, reform of judicial selection methods requires amendment of the state constitution.<sup>101</sup> It is disheartening enough for judges to rest their hopes for reform on politically-controlled, self-interested legislatures, without the added burden of an inflexible amendment process. Thus, the implicit message behind a continuing lack of real judicial independence, reinforced as it is by a local political history of antagonism to constitutional change, is not lost on state courts. It is likely to cause the judicial rejection of interpretations of individual rights provisions which might limit or restrain the local political branches. This is especially true where a more activist approach has no discernable support from either the people or the political parties that administer the executive and legislative branches.<sup>102</sup>

Thus, constitutional flexibility, measured by the relative facility of the state process for amendment, can serve as implicit popular ratification of interpretive discretion and independence in the courts, especially if that very process were to be used to advance state court independence from the political branches through reforms of state judicial selection. Rigidity in the amendatory process, on the other hand, indicates: (1) popular antagonism toward constitutional change of any kind; (2) the absence of at least one important check on independent judicial interpretation; and (3) a lack of means by which to increase judicial independence and thereby encourage independent state constitutional jurisprudence.

### III.

The majority of states experience little if any state constitutional individual rights litigation and few report decisions independently interpreting state bills of rights.<sup>103</sup> Some states, in fact, have

virtually no record of reliance on their state constitutions so that large sections of the country, including the Midwest, remain largely unaffected by the growing trend toward development of independent state constitutional jurisprudence.<sup>104</sup>

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101. Merit selection has been established by executive order only in Delaware, Maryland, and Massachusetts.

102. Criminal procedural rights would be the most obvious example, especially those related to punishment. *See supra* note 4 and accompanying text (arguing that there are disadvantages inherent in expansive judicial review without political or party support).

103. Utter & Pitler, *supra* note 8, at 636 (citation omitted).

104. *Id.* (citations omitted).

Illinois is typical of these midwestern states. Throughout most of the past twenty-five years, the Illinois Supreme Court has largely refused to independently interpret the individual rights provisions of the Illinois Constitution, choosing instead in most cases to follow in lockstep with the United States Supreme Court in matters of individual rights.<sup>105</sup> With only some deviation,<sup>106</sup> this continues to be the case. The general rule is that:

Any variance between the [Supreme Court's construction of a bill of rights provision] and similar provisions in the Illinois Constitution must be based on more substantial grounds. We must find in the language of our constitution, or in the debates and the committee reports of the constitutional con-

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105. See Thomas B. McAfee, *The Illinois Bill of Rights and Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine*, 12 S. ILL. U. L.J. 1, 14 (1987) ("[I]n the face of repeated pleas to acknowledge the court's freedom and duty to independently examine constitutional issues under the state constitution, the supreme court [in *People v. Tisler*, 469 N.E.2d 147 (Ill. 1984)] makes clear that the Court views the practice of following the United States Supreme Court as a governing rule, rather than a discretionary practice of the court."); Denise E. Gale, *State Courts Breaking Their "Lockstep" With Federal Constitutional Decisions*, CHI. DAILY L. BULL., Jan. 21, 1992, at 5 (criticizing the lockstep doctrine). For cases illustrating the "lockstep" doctrine, see, e.g., *People v. Rolfingsmeyer*, 461 N.E.2d 410 (Ill. 1984); *People v. Exline*, 456 N.E.2d 112 (Ill. 1983); *People v. Jackson*, 176 N.E.2d 803 (1961); *People v. Tillman*, 116 N.E.2d 344 (Ill. 1953); *People v. Castree*, 143 N.E. 112 (Ill. 1924). But see *People ex rel. Daley v. Joyce*, 533 N.E.2d 873 (Ill. 1988) (ruling that an accused's right to jury trial under the state constitution exceeded the minimum protection afforded under the federal Constitution because "there is a difference in the language of [the] State constitution . . . and the difference is one of substance and not merely one of form"); *Rolfingsmeyer*, 461 N.E.2d at 413 (Simon, J., concurring) (noting that the assumption that the state constitution has the same content as the comparable federal guarantee unless there is some indication to the contrary is "the reverse of the correct one and inverts the proper relationship between the state and federal constitutions"); *People v. Rosa*, 565 N.E.2d 221, 226 (Ill. App. Ct. 1990) (holding that state constitutional provisions in certain circumstances may be given broader construction than similar federal provisions). For other opinions bucking the "lockstep" tendency, see, e.g., *People v. Porter*, 521 N.E.2d 1158, 1167 (Ill. 1988) (Simon, J., concurring); *People v. Holland*, 520 N.E.2d 270, 285 (Ill. 1987) (Clark, J., concurring); *Tisler*, 469 N.E.2d at 166 (Clark, J., concurring); *Tisler*, 469 N.E.2d at 166 (Goldenhersh, J., dissenting); *People v. Hoskins*, 461 N.E.2d 941, 954 (Ill. 1984) (Simon, J., dissenting); *Crocker v. Finley*, 459 N.E.2d 1346 (Ill. 1984); *People v. Van Cleve*, 432 N.E.2d 837, 841 (Ill. 1982); *People v. Bernasco*, 541 N.E.2d 774 (Ill. App. Ct. 1989); *People v. Bryant*, 520 N.E.2d 890, 892-93 (Ill. App. Ct. 1988).

Most recently, in *People v. Diguia*, 576 N.E.2d 126 (Ill. App. Ct. 1991), an Illinois appellate court held that a defendant's activities in collecting signatures on political nominating petitions, while on the property of a food store, was protected by the Illinois constitutional free speech provision. In *People v. McCauley*, 595 N.E.2d 583 (Ill. App. Ct. 1992), a panel from the same appellate district held that a suspect's protection against self-incrimination was greater under the Illinois constitution than the federal document. A few days after *McCauley*, however, the Illinois Supreme Court reversed *Diguia*, holding that "the State action requirement of the first amendment [sic] is also present in article 1, section 4 of the Illinois Constitution." *People v. Diguia*, 604 N.E.2d 336, 344 (Ill. 1992).

106. *Joyce*, 533 N.E.2d at 873 (granting additional protection because of substantial and explicit differences in the state provision).

vention, something which will indicate that the provisions of our constitution are *intended* to be construed differently than are similar provisions in the Federal Constitution, after which they are patterned.<sup>107</sup>

This difference in constitutional language, if any, must be "one of substance and not merely one of form."<sup>108</sup> This is a conservative view of the appropriate conditions for independent interpretation,<sup>109</sup> but one more or less shared by most states like Illinois, states with infrequent adjudication under their state bills of rights.<sup>110</sup> This is so even though it is never altogether clear why there should be a presumption against independent construction of the state document<sup>111</sup> or why that presumption does not inappropriately render the state bill of rights superfluous.<sup>112</sup>

The Illinois amendment provisions are, interestingly enough,<sup>113</sup> also quite "conservative" in that they have consistently made the Illinois constitution difficult to amend. Illinois has had an inflexible constitution at least since voters first had the opportunity to ratify the constitution of 1848.<sup>114</sup> The 1848 Constitution included a judicial article reflecting the Jacksonian concern for creating democratic accountability through judicial elections.<sup>115</sup> The Illinois Constitution

107. *Tisler*, 469 N.E.2d at 157 (emphasis added).

108. *Joyce*, 533 N.E.2d at 875.

109. Several independent state judiciaries have articulated much broader justifications and conditions for independent and expansive interpretation. *E.g.*, *State v. Hunt*, 450 A.2d 952 (N.J. 1982); *State v. Jewett*, 500 A.2d 233 (Vt. 1985).

110. *See infra* note 117 and accompanying text.

111. *See Note, Developments, supra* note 4, at 1356-66.

112. *See People v. Tisler*, 469 N.E.2d 147, 166 (Clark, J., concurring); McAfee, *supra* note 105, at 29.

113. "Interesting" because the conventional wisdom is that, as in the case of the federal Constitution, many scholars associate a difficult amending process with a heavy reliance on judicial interpretation to accommodate inevitable change. Yet Illinois does not seem to experience expansive interpretation of its state constitution to any great extent, especially considering the historical inflexibility of that document. *See supra* notes 25, 105 and accompanying text (discussing judicial conservatism in interpreting the Illinois constitution).

114. The 1818 Constitution was not submitted to the people for ratification. JANET CORNELIUS, *CONSTITUTION MAKING IN ILLINOIS: 1818-1970*, at 10, 18-19 (1972).

115. *See infra* note 123-26 and accompanying text. The 1848 Constitution established the Jacksonian system of democratic judicial elections. CORNELIUS, *supra* note 114, at 42. Illinois is only one of eight states that still retains all the remnants of this system of selecting judges. This is due, in part, to the fact that the 1848 Constitution, which provided for this system, and the Constitutions that followed were relatively inflexible:

On the one hand, the [1847] delegates inserted policy-making legislation into the constitution in the excessively detailed sections dealing with salaries and *judicial reorganization*. Yet, when faced with the possibility that their work might be amended or changed, they regarded their document as a broad, unchanging statement of fundamental principles, assuming that "wisdom would die with them and that nobody else

of 1870 simply continued the inflexibility of the 1848 document;<sup>116</sup> it was often described as rigid and unworkable.<sup>117</sup> Actually, it was only one of many post-Civil War state constitutions that were ultimately found to be problematic for these same reasons.<sup>118</sup>

By 1944, Illinois was in the worst position with regard to constitutional inflexibility of any state in the Union.<sup>119</sup> Although a majority of the voters frequently had shown that they thought the constitution was in need of general revision, rigid and restrictive provisions prevented such revision from occurring.<sup>120</sup> Consequently, the Sixth

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should be permitted to disturb their labors, and interfere with what they had done." Compared to changes in amending procedures in other states during the period, Illinois's 1848 provisions seem especially rigid. . . . [Divisions within the state] increased suspicions on all sides that future tampering with the constitution, if made too easy, would be harmful. Therefore, the Illinois Constitution submitted to the voters in 1848 was a legislating document, but without the flexibility which might have made such a document effective.

*Id.* (citation omitted) (emphasis added).

116. *Id.*

117. By 1910, the constitutions of Delaware, Oregon, California, and Louisiana were described as flexible; those of Illinois, Tennessee, and Indiana, as well as most of the New England and other Midwestern states, were characterized as rigid. DODD, REVISION AND AMENDMENT, *supra* note 15, at 140-41.

118. "Restrictive provisions" are those in which extensive details which could otherwise have been left to statute are written into the constitution. These provisions often make sections of the constitution obsolete as times and conditions change. The problem becomes compounded when there is limited capacity for revision. See, e.g., Ann Lousin, Illinois Constitutional Law 6 (May, 1979) (unpublished manuscript, on file with author). Louisiana and California are examples of states which have an unusual amount of "legislative detail" yet relatively easy amending procedures. *Id.* at 7. The construction of practically every local dam or road in Louisiana requires a constitutional amendment. LA. CONST. art. 6, § 32; Lousin, *supra*, at 7. Furthermore, for a limited time California gave constitutional status to the Rule Against Perpetuities. CAL. CONST. art. 20, § 9 (repealed Nov. 3, 1970); Lousin, *supra*, at 7. However, the Louisiana legislature can easily submit amendments and California has simple requirements for popular initiatives for both legislation and constitutional amendments. Lousin, *supra*, at 7. The voters in both states vote on constitutional proposals almost every year. *Id.*

119. Charles A. Bane, *The Need for Reexamination of the Illinois Constitution — Workable Amending Clause or Straitjacket?*, 50 CHI. BAR. REC. 18 (1968); Kenneth C. Sears & Charles V. Laughlin, *A Study in Constitutional Rigidity II*, 11 U. CHI. L. REV. 374, 439 (1944); see also Melvin Price, *Urbanism and a New State Constitution*, 17 DEPAUL L. REV. 532 (1968) (explaining that reform of the 1870 Illinois Constitution was needed due to urbanization, confusion about how to provide for growth of local governments, and the new factor of potential federal assistance to urban areas — none of which were effectively dealt with in the outdated constitution).

120. See Sears & Laughlin, *supra* note 119, at 439 (discussing the difficulties in revising the Illinois Constitution). In 1944, Illinois was one of only six states requiring a majority of those voting in the general election (that is, including those not voting on the amendment itself) to ratify a constitutional proposition. *Id.* at 438. In 1919, Illinois was one of fourteen states with this "super-majority" requirement—Alabama, Idaho, Illinois, Kansas, Maryland, Minnesota, Nebraska, Nevada, South Carolina, South Dakota, Tennessee, Utah, Washington, and Wyoming were the others, although Alabama and Tennessee also allowed special elections. Legislative Reference Bureau, *Bulletin No. 3: The Amending Article of the Constitution*, in ILLINOIS CONSTITU-

Illinois Constitutional Convention of 1969-70 sought to make the process of amending the Illinois Constitution easier in several ways.<sup>121</sup> However, it is by no means clear that the work of this Convention has encouraged any constitutional growth.<sup>122</sup>

One of the most striking examples of present inflexibility is the state's perpetual inability to mount a successful reform of judicial selection methods despite a long-held consensus about the need for such reform. The common complaint for many years has been the seeming lack of judicial "independence," most often said to be caused by the fact that judges are elected like members of the political branches. Jacksonian democracy, and its emphasis on popular election of constitutional and legislative officers, had a significant influence on the emergence of judicial elections not only in Illinois, but throughout the country during the mid-nineteenth century.<sup>123</sup>

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TIONAL CONVENTION BULLETINS 121 (1920) [hereinafter *Bulletin No. 3*]. Even prior to the Illinois Convention of 1919-22, it was clear that submission of proposed amendments was much more frequent in some states than in others, such as Illinois, Indiana, and Wyoming. DODD, REVISION AND AMENDMENT, *supra* note 15, at 266-68.

121. This was because, as late as 1969, the Illinois Constitution was still thought of as rigid compared to those of most other states: it was one of only nineteen requiring a two-thirds vote in each house to propose an amendment; one of only fifteen requiring passage of an amendment proposal by two successive legislatures; one of only five requiring a majority vote of those who voted at the general election to ratify an amendment; and one of only four that did not allow submission of an amendment to the same article for a designated period. Robert W. Bergstrom, *The Amending Process*, in CON-CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION 465, 470-71 (Victoria Ranney ed., 1970). The state had made only fourteen changes in the hundred years prior to 1970; New York, on the other hand, had made 168 changes to a document only seventy-five-years-old by 1970. CORNWELL ET AL., POLITICS OF REVISION, *supra* note 23, at 4. By 1960, fifteen states had amended their constitution over 70 times a piece. Bartley, *supra* note 25, at 22 n.1.

122. "Innovative" provisions added in 1970 were still relatively conservative in their approach. There are, for example, only fourteen states at present with the requirement that convention calls be submitted periodically, ranging from Hawaii at nine years, Alaska, Iowa, Rhode Island, and New Hampshire at 10 years, Michigan every sixteen years, and Illinois, Connecticut, Montana, Maryland, Missouri, New York, Ohio, and Oklahoma at 20 years. Also, unlike Illinois, forty states now require only a majority vote on a constitutional proposition, and most states place no other restrictions on the election process. May, *supra* note 11, at 157.

123. COMISKY & PATTERSON, *supra* note 60, at 4. "The general population was resentful that property owners controlled the judiciary. There was a common desire to terminate the privileges of the upper class, making the influence of Jacksonian Democracy, with its notions of popular sovereignty, pervasive." LARRY BERKSON ET AL., JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 3 (1981). In other words, the shift to elections "was based on emotion rather than on a deliberate evaluation of experience under the appointive system." HURST, *supra* note 21, at 140. It was also a "lawyer's reform" seeking "to ensure that state judges would command more rather than less power and prestige." Kermit L. Hall, *Constitutional Machinery and Judicial Professionalism: The Careers of Midwestern State Appellate Court Judges, 1861-1899*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 29 (Gerard W. Gawalt ed., 1984) [hereinafter Hall, *Judicial Professionalism*].

Understandably, there was substantial debate during the 1847 Illinois Convention on the momentous proposed change from the appointment system to an election system. Onslow Peters, a delegate from Peoria, was the strongest advocate for retaining the appointive system. He stressed the need to maintain an independent judiciary and he argued that elections put the judiciary in a position where "it was easily induced to swerve from the path of rectitude, and its purity endangered by becoming dependent upon [the political parties] for support."<sup>124</sup> Other delegates believed that elections helped establish needed judicial independence from the executive and legislative branches.<sup>125</sup> In the end, the argument that tipped the scale in favor of judicial elections was that the delegates simply did not like the 1818 Constitution's practice of allowing the legislature to appoint judges for life.<sup>126</sup> Judicial elections have survived in Illinois for 146 years.

Since 1848, there have been efforts to both institute more completely the "Missouri Plan" or return to an appointment system, but they have failed in Illinois not only due to opposition from political parties but equally to the gross inflexibility of the 1870 Constitution.<sup>127</sup> At the 1969-70 Convention, the issue was considered so sensitive that, so as not to endanger the entire Constitution, it was decided the electorate should vote on a separate proposition to change

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124. COLE, *supra* note 100, at 458. Peters argued that judicial election was incompatible with independence because decisions which offended the "power" or "party" which put them in office could destroy their livelihood. He also believed that the people were not competent to determine the quality of judicial candidates. *Id.* at 458-60.

125. *Id.* at 461. David Davis, future U.S. Senator and U.S. Supreme Court Justice, thought that any system could be abused. He suggested that he would "rather see judges the weathercocks of public sentiment, in preference to seeing them the instruments of power . . . registering the mandates of the Legislature, and the edicts of the Governor." *Id.* at 462. William Archer also believed that election of the judges by the people would not cause judicial reliance on a particular person or group and would thus promote judicial independence. *Id.* at 463.

126. *Id.* at 465. Only about one-fourth of the delegates sided with a system of appointment. *Id.* at 484.

127. RUBIN G. COHN, *TO JUDGE WITH JUSTICE: HISTORY AND POLITICS OF ILLINOIS JUDICIAL REFORM 9-10* (1973). Efforts at creating greater judicial independence were thwarted by the "super-majority" effectively required to pass a constitutional judicial reform measure under the 1870 amendment provisions. *Id.* at 10. For about ten years after the 1950 Gateway Amendment, which eased the amending process, the Illinois and Chicago Bar Associations jointly recommended the reform of judicial selection based on merit known as the Missouri Plan. Adopted in part by Missouri in 1940, the plan was proposed by Professor Albert Kales of Northwestern University Law School and was promoted by the American Judicature Society. COMISKEY & PATTERSON, *supra* note 60, at 4. See *supra* note 100 and accompanying text (briefly discussing the fundamentals of the plan).

to an appointive system.<sup>128</sup> Two million votes were cast; the judicial appointment proposition lost by fewer than 150,000 votes. "Down-state Illinois, with its consistently conservative tradition of resistance to any constitutional change, tipped the balance in favor of . . . the elective process."<sup>129</sup> Since then the "General Assembly has steadfastly refused to set up a merit system for filling vacancies or to put a constitutional amendment on merit selection up for a popular referendum."<sup>130</sup> None of this has been lost on the Illinois judiciary, which continues to function in an environment closely controlled by the political branches.<sup>131</sup> In fact, whatever efforts that have been made to move toward the appointment system or a complete Missouri Plan may actually have detracted from, rather than contributed to, judicial independence.<sup>132</sup>

128. To explain why conventions occasionally engage in this strategy, the late Professor Swindler suggested that:

Offering to the electorate in a single package an integrated revision of the existing constitution has substantial logic but an even more substantial political handicap. It permits disparate groups critical of different and unrelated elements in the draft proposal to unite into an aggregation of minorities which thus becomes an accidental majority in opposition. It hazards its chances for adoption on the unwarranted assumption that the average elector has the same sophisticated understanding of the flaws in the existing charter and the rationale of the new remedies which became apparent to the draftsmen in the course of their work on the revision.

Swindler, *supra* note 53, at 591.

129. COHN, *supra* note 127, at 142.

130. Nancy Ford, *From Judicial Election to Merit Selection: A Time for Change in Illinois*, 8 N. ILL. U. L. REV. 665, 680 (1988).

131. The weight of authority indicates that the election of judges in Illinois has not produced judicial independence to the same extent as states that have elements of the Missouri Plan in their judicial selection schemes. Under the Missouri Plan, the person who makes the final selection of judicial candidates — the Governor — is elected by the people, is accountable to them, and is seen to wield *less* political patronage power than political parties themselves because only a short list of candidates reaches the executive mansion. SPECIAL COMM. ON MERIT SELECTION OF JUDGES BY APPOINTMENT, REPORT AND RECOMMENDATIONS TO THE BOARD OF GOVERNORS AND THE ASSEMBLY OF THE ILLINOIS STATE BAR ASSOCIATION 3 (1987). Furthermore, the nonpartisan retention election after the selected judge has served a relatively short probationary period is said to give the voters more meaningful input than does an initial election system; voters in the former system have some judicial record on which to base a more informed decision. COHN, *supra* note 127, at 17.

132. Several scholars believe that efforts to increase the "professional accountability" of judges at the expense of their "democratic accountability" have been unnecessary, counterproductive, and harmful to judicial independence by undermining the judiciary's "popular credibility." Hall, *Popular Elections*, *supra* note 60, at 369, cited in Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elected Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 203 n.101 (1993). These efforts may have resulted from changing assumptions about the nature of judging:

If the function of appellate judging is considered essentially technical, then popular elections and limited tenure in office thrust unwanted and undesirable political consid-



The problem, unfortunately, is that election advocates and appointment advocates both argue that their method secures judicial independence. Both suggest that independence is necessary because the judiciary must be free of interference from or influence by the citizenry.<sup>133</sup> Neither group, however, adequately acknowledges the role of political partisanship in the lack of actual judicial independence, especially concerning "constitutional" matters that come before the judiciary. Even nonpartisan elections are no improvement. Removing party affiliations from the ballot does not guarantee the reduction of partisan political influence; it only shifts party responsibility to candidate selection and the supervision of judicial performance.<sup>134</sup>

Alexander Hamilton thought that lifetime appointment during good behavior — the approach taken by the 1818 Constitution as well as an accepted political doctrine and an English tradition eventually established by statute (1700)<sup>135</sup> — was "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."<sup>136</sup> He thought lifetime appointment would insulate judges from the real problem: potential influence by the executive or legislative branches, regardless of how judges were originally chosen.<sup>137</sup> Hamilton may have been right. There has been little real "judicial independence" in Illinois since the 1848 Constitution,<sup>138</sup> and without the guarantee of reasonably

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erations into the selection process and, ultimately, into the performance of the judicial role. On . . . the other hand, if the judicial role is more art than science, and an art that ought to be sensitive to political necessity as well as formal legal rules, then popular election offers a legitimate means of ensuring judicial accountability through the political process.

Hall, *Judicial Professionalism*, *supra* note 123, at 34.

133. Robert W. Bergstrom, *Non-Political Judiciary is Goal: Merit Proponent*, CHIC. DAILY L. BULL., June 2, 1988, at 2.

134. COHN, *supra* note 127, at 16. Thus, judicial dependence continues, given the fact that judges still cannot accomplish at least "one object of the judiciary [, which is] to protect the people from the other branches of government . . . ." COLE, *supra* note 100, at 466 (comments of Delegate Archibald Williams) (emphasis added); *see also id.* at 461-62 (comments of Delegate David Davis); CHAMPAGNE & HAYDEL, *supra* note 100, at 11 ("At one level, the controversy over judicial selection appears to be a conflict between the values of judicial independence and democratic accountability. However, there is another dimension to the issue. [It] also involves the issue of whom is in a position to control the recruitment and selection of judges.").

135. ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 286 (1987).

136. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

137. *Id.* at 466-71.

138. Politics and economics have combined to pull judges in one direction and then the other since the 1840s. "State constitutional revision in the 1840s and 1850s embodied a growing inclination to hobble the power of the executive, the legislature, [and] the courts . . . ." Morton Keller,

lengthy tenure in office and nonpartisan selection of objectively meritorious judicial candidates, there can be little judicial independence in any state.

What is important, however, is that in Illinois there is a common basis for: (1) the inflexibility of the amending provisions; (2) the resultant tradition of judicial dependence on the political branches; and (3) the continuing relative reluctance of the Illinois courts to engage in independent expansive constitutional interpretation.<sup>139</sup> That is, these conditions all result from the "political culture" of a given state. Illinois is one of five states in the middle of the country that are generally ranked low in what has been called "internal cohesiveness." Instead, it is a state

united primarily in [its] concern with maintenance of the established political patterns that give [it] power against various pressures, usually external. Since there is little that unites the public in these states, the problems of the powerholders remain the most significant ones. They include the maintenance of low tax rates against the pressures of rising needs for governmental

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*The Politics of State Constitutional Revision, 1820-1930, in THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE* 67, 72 (Kermit L. Hall et al. eds., 1981). The Illinois courts, in particular, operated under volatile conditions from 1840 to 1854, and there was virtually no judicial independence or devotion to balanced decision-making in Illinois until at least the 1870s. KEITH R. SCHLESINGER, *THE POWER THAT GOVERNS: THE EVOLUTION OF JUDICIAL ACTIVISM IN A MID-WESTERN STATE, 1840-1890*, at 5 (1990). "[T]he law and business tended to gravitate toward one another before the Civil War. For example, [state] Supreme Court Justice John Dean Caton, who also served as president of the state's primary telegraph company, became deeply involved in the compromise which took shape in the telegraph industry." *Id.* at 6. The Civil War accounted for the factors which ultimately enhanced the authority of judges and lawyers, while reducing that of the politicians well into the 1890s. *Id.* at 6-8.

139. Elazar has said that the "political culture" of the midwest originated when:

Across New York, northern Pennsylvania, and the upper third of Ohio, the Yankee stream moved into the states of the upper Great Lakes and Mississippi Valley. There they established a greater New England in Michigan, Wisconsin, Minnesota, and Iowa, and they attempted to do the same in settling northern Illinois. . . .

Unlike the Puritans who sought communal as well as individualistic goals in their migrations, the pursuit of private ends predominated among the settlers of the middle [Atlantic] states. . . . The political culture of [these] middle states reflected this distinctive emphasis on private pursuits from the first and, by the end of the colonial period, a whole system of politics designed to accommodate itself to such a culture had been developed. . . . [This group] moved westward, across Pennsylvania into the central parts of Ohio, Indiana, and Illinois, then on into Missouri. There, reenforced by immigrants from western Europe and the lower germanic states who shared the same attitudes, they developed extensions of their pluralistic patterns. *Since those states [including Illinois] were also settled by representatives of [the Yankee Moralists and Southern Traditionalists], giving no single culture clear predominance, pluralism became the only viable alternative. So the individualistic political culture became dominant at the state level in the course of time while the other two retained pockets of influence in the northern and southern sections of each state.*

ELAZAR, *AMERICAN FEDERALISM*, *supra* note 20, at 108-12 (emphasis added).

services, the maintenance of patronage systems . . . and the maintenance of entrenched political organizations and alignments . . . .<sup>140</sup>

The state was settled mostly by Southerners, who produced the brief 1818 document which reflected the South's approach to constitution-making at that time.<sup>141</sup> But by the 1830s, New Englanders arrived and settled in great numbers, ultimately influencing changes in the 1848 Constitution to suit their own needs after successful negotiation and compromise with those from Southern and Middle-state backgrounds.<sup>142</sup> The Civil War, however, divided Illinois as se-

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140. *Id.* at 21 (citation omitted). "[Entrenched] organizations and alignments" must be maintained because:

[I]n most states (Illinois and its relations with Chicago may be one exception) the cultural question is a mitigating or intensifying factor of some importance. In those states with major metropolitan centers that have attracted immigrant groups reflecting political cultures different from those dominant among the older population elements in the state as a whole, the metropolitan-outstate conflict has invariably been intensified beyond the relatively simple conflict between urban and rural economic interests. The reason is simple. When men holding power believe that those seeking to displace them share their basic values, they are less likely to fear political change. However, when such change also promises to introduce men who will alter the very basis of the political value system — i.e., change the political consensus at its most crucial point — the intensity with which men will hold onto their positions is immeasurably increased.

*Id.* at 129.

141. Elazar, *State Constitutions*, *supra* note 15, at 20. Illinois, like the six other states admitted into the Union between 1801 to 1830, had a common constitution based on the Northwest Ordinance of 1787, which included those features of rights, popular representation, and democracy characteristic of the great middle west of that period. Congress set the rules for admission of territories as states in the enabling act permitting the calling of a convention and articulating the conditions to be embodied in the state constitution. These details were set out in an ordinance which was an "irrevocable compact" between the territory and Congress. This constitution was not submitted to referendum, as Congress did not require a popular referendum until the enabling act for Minnesota was presented in 1857. The 1818 Constitution gave legislative veto power to the Governor and judges of the Supreme Court. *Id.*

142. *Id.* The 1848 document was conciliatory in many respects, seeking to heal all nature of enmity between the different factions in Illinois. That document may even have begun a tradition of heightened deference for religious freedom in Illinois in the course of integrating a variety of difficult compromises:

When the 1818 constitution was written, a sect of Covenanters in Randolph County presented petitions asking that "this convention may declare the scriptures to be the word of God, and that the constitution is founded upon the same." The petitions were ignored, and according to Governor Ford, the Covenanters for many years "refused to work the roads under the laws, serve on juries, hold any office, or do any other act showing that they recognized the government." Remembering this, Judge Lockwood of Morgan County created an addition to the [1848] preamble, which stated that "We, the People of the State of Illinois [are] grateful to Almighty God, for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations."

verely as the nation, straining the compromises of the 1840s.<sup>143</sup> To restore harmony and settle outstanding differences, the state adopted the 1870 Constitution, which maintained the compromises of 1848 but "restructured the institutions [of] compromise to allow for [and protect] minority representation in each part of the State."<sup>144</sup> Between 1870 and 1970:

[N]one of the several attempts to adopt a new constitution succeeded, precisely because leaders of the state's important interests were afraid to upset the balance of forces established by the compromise. New interests were accommodated[, if at all,] by constitutional amendments, initially granting home rule to Chicago in 1904, and a spate of modernizing amendments in the late 1950s. The cleavages of the Civil War era[, it was thought], had sufficiently diminished by the late 1960s to enable a new constitutional convention to shape a document that is considered to be one of the most advanced in the country.<sup>145</sup>

But "the cleavages of the Civil War era" may not have completely diminished. In Illinois, the mostly "individualistic" and "disunified" political culture has continued to produce significant popular fear of easy change in the political status quo. The historic cleavages, and the fear of potentially significant shifts in control of policy-making authority to different antagonistic political factions in the state,<sup>146</sup> are not only reflected in the continuing conservative approach of the courts and the legislature toward fundamental constitutional change,<sup>147</sup> but also in the traditionally restrictive and difficult amendment and revision provisions.

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CORNELIUS, *supra* note 114, at 33 (citations omitted).

143. Elazar, *State Constitutions*, *supra* note 15, at 20.

144. *Id.* For example, the introduction of multi-member legislative districts in the 1870 Constitution was "a means of holding the state together after the cleavages of the Civil War era." Daniel J. Elazar, *State Constitutional Design in the United States and Other Federal Systems*, 12 *PUBLICUS: J. FEDERALISM*, Winter 1982, at 1, 2 [hereinafter Elazar, *Constitutional Design*].

145. Elazar, *State Constitutions*, *supra* note 15, at 20.

146. "The passage of each constitution in Illinois has depended on avoiding the strong hostility of any major state group." CORNELIUS, *supra* note 114, at 63.

147. Professor David Kenney, the senior author of *BASIC ILLINOIS GOVERNMENT: A SYSTEMATIC EXPLANATION* (1993), was a member of the Governor's cabinet for eight and one-half years, and has written a biography of former Governor William G. Stratton as well as an account of the Illinois Constitutional Convention of 1967-70. Professor Kenney points out that:

[Even] in going over [the list of amendments since 1970], one is struck by the lack of general significance of the matters which the General Assembly has chosen to propose to the public as amendments to the constitution. And it certainly is not that the public lacks serious constitutional concerns. [Yet even] in the face of strong sentiment for change in the Judicial article [in recent times], no proposed amendment has come out of the General Assembly. The "old boy network" binding legislators, judges and party personnel together has been too strong to allow any proposals for changes to occur.

David Kenney, *The Need for a Broader Public Initiative In Amending the Illinois Constitution* 5-

## IV.

[The] single fact or enterprise which more nearly than any other single thing embraced the significance of the American Revolution . . . [was] the formation of the Massachusetts [Constitutional] Convention of 1780, . . . [resulting in a] constitution [which] rested upon [a] fully developed convention, the greatest institution of government which America has produced, the institution which answered, in itself, the problem of how men could make government of their own free will.<sup>148</sup>

The only means of amendment provided for in the Illinois Constitution of 1818 was the constitutional convention. The idea of a constitutional convention was of fundamental importance in the early history of the United States. This starkly original method of creating fundamental charters that would last for generations probably had its beginning on May 10, 1776, when the Continental Congress passed a resolution which advised the colonies to "form new governments."<sup>149</sup> The Continental Congress, however, failed to indicate how this should be accomplished. Constitutional conventions, with power derived directly from the people, were not contemplated at the time of the Articles of Confederation. Legislatures generally devised constitutions in the decades preceding and following the American Revolution.<sup>150</sup> Yet by 1784<sup>151</sup> — and certainly by 1787

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6 (1988) (unpublished manuscript, on file with author). According to Professor Kenney, this includes inaction in the other areas generally deemed to be in need of change, e.g., educational financing, the definition and audit of "public funds," the implementation of anti-discrimination provisions, the Compensation Review Board's operations, and the amendatory veto, to say nothing of the procedures for reapportionment. *Id.*

148. Howard, *Introduction*, *supra* note 14, at xiii (quoting Andrew C. McLaughlin, *American History and American Democracy*, 20 AM. HIST. 255 (1915)); *see also* AMERICAN CONSTITUTION, *supra* note 66, at xi ("The Massachusetts constitution of 1780 . . . was the first to be drafted by a convention elected just for that purpose . . . [and] it was the first American constitution to be submitted to the electorate" — setting a precedent for the 1787-88 federal convention); DODD, REVISION AND AMENDMENT, *supra* note 15, at 23 (noting the constitutional convention was developed in Massachusetts during the Revolutionary period "for constitutional action, with the submission of its work to a vote of the people"); HURST, *supra* note 21, at 205-07 (stating that the Massachusetts convention was also the first to submit the question of calling a constitutional convention to the voters); Harvey Walker, *The Myth and Reality in State Constitutional Development*, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 15 (1960) ("[T]he constitutional convention is a distinctively American contribution to political theory and action. . . . [I]t is the personification of the sovereign people assembled for the discharge of the solemn duty of framing their fundamental law.").

149. AMERICAN CONSTITUTION, *supra* note 66, at 8.

150. W.P. ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 63-66, 75 (1980); GORDON

— legislatures were considered incompetent to do so; to suggest in 1787 that a legislature ought to draft a constitution would have been viewed as dangerous.<sup>152</sup> In a matter of a few years, legislating and the drafting of constitutions quite suddenly came to be considered two entirely different tasks, each requiring a separate body.<sup>153</sup> There is little doubt, therefore, that during those eleven tumultuous years from 1776 to 1787, American political thought underwent a sort of “Kuhnsian” revolution,<sup>154</sup> resulting in a uniquely new awareness of how to create and maintain popular sovereignty.<sup>155</sup> There

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S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1783*, at 306 (1969); Howard, *Introduction*, *supra* note 14, at xii-xiii.

151. DODD, *REVISION AND AMENDMENT*, *supra* note 15, at 38.

152. WOOD, *supra* note 150, at 306.

153. *See* ADAMS, *supra* note 150, at 63-66, 75.

154. Sometimes in the history of science, the general view held within a particular discipline of how the relevant world operates radically changes as a result of some sudden, new intellectual insight. This new realization creates a paradigm which explains (or allows for) phenomena that could not be understood (or foreseen) within the terms of the previous “world view” or paradigm. Thus, a “scientific revolution” destroys a paradigm and replaces it with a radically more useful one. For a discussion of this notion, *see generally* THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). It would be fair to say that the major advance in political science represented by the development of “popular sovereignty” as a practical possibility arose because of a sudden new insight into what constitutions could be and how they might be organized and maintained indefinitely by the people as the ultimate sovereign power.

155. In 1776, the conventional wisdom was that most any political system that could be devised would inevitably degenerate because “governments had never been able to adjust continually to the operations of human nature.” WOOD, *supra* note 150, at 613-15. But the American states possessed:

[A] “healing principle” built into their constitutions, which contained within the means of [their] own improvement. The idea of incorporating, in the constitution itself, a plan of reformation, enabling the people periodically and peacefully to return to first principles, as Machiavelli had urged, the Americans realized, was a totally new contribution to politics. In one thing [the early state constitutions] were perfect. They left the people in the power of altering and amending them whenever they pleased. Americans had, in fact, institutionalized and legitimized revolution.

*Id.*; *see also* ADAMS, *supra* note 150, at 139-44.

British constitutionalism (which included the use of colonial charters) and its understanding that a constitution was a permanent code to which those in power were subject and which they had no authority to alter, was quite important to the development of early constitutions. *Id.* at 18-22. But in the New World, “constitution” no longer referred to the actual organization of power developed through custom, prescription, and precedent. AMERICAN CONSTITUTION, *supra* note 66, at ix-x. Instead, it had come to mean a written document setting fixed limits on power. This view was closely related to the rejection of the old concept that authority descended from the Crown in favor of the new view that authority was derived from the consent of the governed. The latter view held that written constitutions were instruments by which people delegated and entrusted power to their agents. *Id.* (quoting OSCAR HANDLIN & MARY HANDLIN, *THE DIMENSIONS OF LIBERTY* 55 (1961)). “[The] analogy between corporate charters and political constitutions had profound implications” for the Federalists. The analogy suggested that government power could be *bounded* by its “charter, [and] the fence could be maintained by judges following an emerging body of agency law.” Amar, *supra* note 31, at 1434-37. Professor Amar asks:

was a new understanding that "permanent" constitutions might be accomplished not by legislatures, as in the past, but by separate bodies popularly called "conventions," with delegates elected for that purpose, whose efforts would then be ratified by the people.

One important scholar of the early Republic, commenting on the significance of the growth of political sophistication between 1776 and 1787, stated:

[The] idea of a convention of the people existing outside of the legislature was far more important than the concept of a higher law in indicating the direction American political thought was taking in the years after independence, [but] the two ideas were inextricably linked, and developed in tandem; for if the constitution were to be made truly immune from legislative alteration, it soon became obvious that it would have to be created by a power superior to that of the ordinary legislature. [citations omitted] [But most] Americans in 1776 had as yet no real modern appreciation of the permanent and unalterable nature of the constitution, or if they did, they possessed little knowledge of the means by which it was to be made permanent and fundamental.<sup>156</sup>

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[How] could the power of colonial governments be legally limited if the sovereign was by definition above the law? The ultimate American answer, in part, lay in a radical redefinition of governmental "sovereignty." [G]overnments could be delegated limited powers to govern . . . . [But who], then, was the ultimate unlimited sovereign . . . ? The American answer was at once traditional and arresting: True sovereignty resided in the People themselves. . . . By thus relocating true sovereignty in the People themselves Americans domesticated government power and decisively repudiated British notions of "sovereign" governmental omnipotence. . . .

This change in thinking did not occur overnight. Considerable noise, literally and figuratively, punctuated the great constitutional debates between 1763 and 1789. Old words took on new meanings, as patriots struggled to build an intellectual framework that would order their thinking, affirm their deepest values, and make sense of the ideological spinning . . . around them.

Amar, *supra* note 31, at 1434-37; see also James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockian Constitution*, 52 U. PITT. L. REV. 189, 200-13 (1990) [hereinafter Gardner, *Popular Sovereignty*] (discussing the doctrine of popular sovereignty); Gardner, *Failed Discourse*, *supra* note 14, at 813 (noting that the American approach also solved the problem of how there could be federal and state "dual sovereigns"); Colantuono, Comment, *supra* note 16, at 1495 (noting that these new constitutions additionally limited the power of popular majorities).

156. WOOD, *supra* note 150, at 306-07; Colantuono, Comment, *supra* note 16, at 1495. The town meeting of Concord, Massachusetts is often credited with "inventing" the constitutional convention on October 21, 1776. It was the first to propose this method in response to the dilemma posed by the fact that the body that creates a constitution would have the power to change it, and thus a constitution drafted by the legislature would offer the people no protection against the legislature itself. ADAMS, *supra* note 150, at 88-89; Resolutions of the Town Meeting of Concord, Massachusetts, October 21, 1776, reproduced in AMERICAN CONSTITUTION, *supra* note 66, at 8-9. However, Concord may not be entitled to this distinction. The New York Mechanics Guild had publicly called for the popular ratification of constitutions — at about the same time and with the same reasoning as that of the Town Meeting of Pittsfield, Massachusetts — soon after the Continental Congress's original resolution in May, 1776. The objection of both these latter groups was

Conventions have been widely used for amending state constitutions since the ratification of the Massachusetts Constitution of 1780.<sup>157</sup> Clearly, such use will continue in the future.<sup>158</sup> The popularity of conventions is due to several distinct advantages which they possess, such as: the high quality of delegates; the relatively large degree of freedom they enjoy in making proposals for change — in fact, delegates are expected to focus on the question of the need for change; and they are less vulnerable to political pressures than the legislature.<sup>159</sup> Conventions also tend to stimulate public interest be-

to the authority of the legislature to draft, enact, and *modify* a constitution. ADAMS, *supra* note 150, at 85, 88. Consequently, the draft constitution prepared by the Massachusetts legislature in 1778 was soundly defeated. The principal objection was that the document was not drafted by a special convention (other objections were the lack of a declaration of rights and certain problems with apportionment). JAMESON, CONSTITUTIONAL CONVENTION, *supra* note 14, at 251; Shapiro, *supra* note 22, at 642. A convention was finally elected in 1779, for the express purpose of drafting a constitution with the product to be submitted to the people for ratification. AMERICAN CONSTITUTION, *supra* note 66, at 8. Although 30 delegates were to compose the initial draft, the work was done almost entirely by John Adams. The finished document was finally approved in 1780, and "popular sovereignty" came into being.

157. ALBERT L. STURM, MODERNIZING STATE CONSTITUTIONS 1966-1972, at 8 (1973) [hereinafter STURM, MODERNIZING CONSTITUTIONS] (stating that "224 such bodies were convened in the States through 1972"); May, *supra* note 11, at 164 (noting that there were more than 230 such bodies by 1986); see generally Samuel W. Witwer, *The Shape of the Illinois Constitution*, 17 DEPAUL L. REV. 467, 468 (1968) ("Constitutional conventions have been the principal means utilized in writing new constitutions and revising old ones . . .").

158. STURM, MODERNIZING CONSTITUTIONS, *supra* note 157, at 8. Sturm writes:

In American states, the traditional method for extensive revision of an old constitution or writing a new one is the constitutional convention . . . Although employed primarily for major overhaul and to draft new basic charters, in recent decades conventions have been used increasingly to propose more limited alterations in the form of one or more amendments when other methods were unauthorized or inexpedient. Thirty-nine state constitutions . . . expressly authorize the use of constitutional conventions, but they have been sanctioned extraconstitutionally by judicial interpretation and practice in the remaining States.

*Id.*

159. According to Professor Janice C. May:

[A]n "idealized" approach to changing a state constitution is fairly common among convention delegates, who view their role as something different from engaging in "normal" politics. Also, the movement for a new constitution is commonly led by reformers who prefer a nonpartisan or a bipartisan approach.

May, *supra* note 11, at 169. In fact:

[T]o the extent that conventions appear political and operate like normal legislatures (which rarely have favorable public images), they will fall far short of the ideal they are expected to approximate. [Consequently, the delegates should be] chosen in such a way as to guarantee a modicum of disinterestedness and stature as well as broad representations.

CORNWELL ET AL., POLITICS OF REVISION, *supra* note 23, at 15-18. But see Walker, *supra* note 148, at 15 (stating that "experience has shown that the convention rarely rises above the legislature in the quality and experience of its membership and that pressure groups and political parties have significant influence upon its deliberations").



cause they are the most familiar method of constitutional revision.<sup>160</sup> On the other hand, there are some disadvantages. These include: rigid procedural requirements in some states; the inevitable opposition of vested interests; legislative hostility; the high cost of holding a convention;<sup>161</sup> the substantial time required to authorize and assemble a convention; general public inertia; and the fear of radicalism — which is particularly high in Illinois.<sup>162</sup>

Illinois has had six constitutional conventions. Of the six, four produced constitutions which were adopted, but only three were ratified directly by the voters.<sup>163</sup> Congress, acting under the Northwest Ordinance of 1787, passed an enabling bill for Illinois's first constitutional convention, and President James Monroe signed that bill into law on April 18, 1818.<sup>164</sup> Thirty-three delegates were elected in July of that year and they convened in August.<sup>165</sup> Their constitution was approved by both Congress and President Monroe and went

160. STURM, *MODERNIZING CONSTITUTIONS*, *supra* note 157, at 32.

161. *Id.* The initial appropriation for the 1969 Illinois Convention was \$2,880,000.00, including the appropriation for the Constitution Study Commission. *Id.* at 39. However, \$13,924,063.00 was ultimately spent for the 1969-70 Convention, and estimates for a new convention in 1990 (adjusted for increases in inflation) were as high as \$31,000,000.00. ILLINOIS SECRETARY OF STATE, *VOTERS' PAMPHLET ON THE PROPOSED CALL FOR A STATE CONSTITUTIONAL CONVENTION* 11 (1988).

162. The fear of radicalism at constitutional conventions is particularly persistent and intense in Illinois. The popular and legislative disaffection for efforts at constitutional revision is longstanding. There are good reasons for this. For instance, whenever state constitutional conventions are to be held pursuant to a successful referendum, it is generally the responsibility of the legislature to enact enabling legislation (finances, rules, etc.). See *supra* notes 260-64, 267 and accompanying text (discussing the obligation of the Illinois General Assembly to enact enabling legislation). Just after the turn of the century, however, out of the more than 200 called state conventions, there were only six occasions when, notwithstanding popular approval of unlimited conventions, state legislatures nevertheless felt compelled to attempt to control or restrict that convention in the enabling legislation. *Three* of these six attempts were in Illinois (the conventions of 1848, 1862 and 1869); the other instances were in Pennsylvania (1873), Alabama (1901), and Virginia (1902). DODD, *REVISION AND AMENDMENT*, *supra* note 15, at 91 n.33. Thus, from a historical point of view, legislative apprehension at the prospect of an "open" convention in Illinois was understandable, especially given the unusual activities in the Illinois Conventions of 1847 and 1862. See *infra* notes 174-76, 183-94, and accompanying text.

163. See generally CORNELIUS, *supra* note 114 (highlighting the history of constitution-making in Illinois). Cornelius writes:

Although some states were submitting their proposed constitutions to a popular vote, including Mississippi in 1817 and Connecticut in 1818, no suggestion of such a procedure seems to have been made in Illinois [in 1818. The 1818] Illinois Constitution did require approval by Congress and the President of the United States, however.

*Id.* at 18-19. Illinois's constitution went into effect on December 3, 1818, when President James Monroe signed the joint congressional resolution admitting Illinois into the Union. *Id.* at 20. The constitutions of 1848, 1870, and 1970 were ratified by the voters. *Id.* at 44, 81, 160.

164. *Id.* at 3-20.

165. *Id.* at 6.

into effect on December 3, 1818.<sup>166</sup> Constitutional revision could only be effectuated by convention under this constitution.<sup>167</sup> The article on the amending process, copied from the Ohio Constitution, required a two-thirds vote of the General Assembly to place before the voters the question of whether "to vote for or against a convention."<sup>168</sup> It required that once the question to call a convention was on the ballot, it took the affirmative vote of a "majority of all citizens of the state, . . . voting for representatives" to convene such a convention.<sup>169</sup> The provision ultimately proved unduly restrictive, albeit inadvertently, when radical changes in ballots transformed this innocuous language into a "super-majority" requirement needed for authorizing a convention. The number of delegates would equal the number of members of the General Assembly. There was no requirement that the efforts of the convention be approved by voter referendum.<sup>170</sup>

The 1818 Convention had before it another potential model for an amending article — the more radical Indiana Constitution of 1816, which provided for an *automatic* vote on whether to call a convention every 12 years. In Indiana, the election on a convention call question did not always have to be initiated by the legislature.<sup>171</sup> Yet while the Illinois delegates borrowed extensively from the Indiana Constitution, they chose not to include the automatic periodic convention call provision.<sup>172</sup> Thus one finds relative caution over constitutional change even from the moment of Illinois's inception.

After a lack of success in 1824<sup>173</sup> and 1842, a convention call was

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166. *Id.* at 20.

167. *Id.* at 16.

168. *Id.*; ALAN S. GRATCH & VIRGINIA H. UBIK, *BALLOTS FOR CHANGE: NEW SUFFRAGE AND AMENDING ARTICLES FOR ILLINOIS* 12-13 (1973).

169. *Id.* at 16. It would eventually become a "super-majority" requirement because not everyone would vote on the amendment itself. The effect of an abstention is therefore a "no" vote. For example, suppose 100 people vote in the election for representatives. Suppose also that there is a constitutional amendment being voted upon at the same election, and that 45 people vote "yes" on the amendment while 25 people vote "no" (this means 30 people did not vote on the amendment). Even though the amendment had more "yes" votes than "no" votes, it would still fail because a majority of the 100 total people voting (that is, 51) did not vote in favor of the amendment.

170. See *supra* note 163 and accompanying text.

171. This practice was modeled after the Constitutions of Massachusetts (1780) and New Hampshire (1792). CORNELIUS, *supra* note 114, at 16 (citing 2 FRANCIS N. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS* 1057-59 (1909)).

172. *Id.*

173. *Id.* The very first convention call submitted to the people after 1818, the call question of 1824, was part of a hotly-contested effort to use a convention for purposes of amending the 1818 Constitution in order to permit slavery in Illinois. *Id.* at 20-23. The convention call question was

finally carried in 1846, and the convention convened in 1847. This convention resulted in an intensification of the tension among the factions in the state. The practice of submitting state constitutions for popular approval was followed without exception by state conventions held between 1840 and 1860. Yet the 1847 Illinois convention was one of the rare few conventions during this period which actually declared an article of the proposed constitution in force without submitting it to the people.<sup>174</sup> Only three other conventions among those not held during the Revolutionary or post-Civil War period asserted similar power.<sup>175</sup> With the exception of that one article, the resulting constitution was submitted to and ratified by the voters on March 6, 1848.<sup>176</sup>

The most significant improvement in the 1848 document's amending provisions was the new alternative method of revision (common almost everywhere else by that time) — legislative amendment.<sup>177</sup> Under this method, either house could propose amendments.<sup>178</sup> If two-thirds of the elected members approved the amendment in a given legislative session then there would be a second vote on the amendment after an intervening general election.<sup>179</sup> If a two-thirds majority of those subsequently elected to each house then approved the proposal and if it was published in full at least three months before the *next* election of members of the General Assembly, it would be submitted to the electorate.<sup>180</sup> The only other restriction on the 1848 process was that amendments could not be proposed to more than one article of the constitution at any general election.<sup>181</sup>

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ultimately defeated, with voting patterns reflecting southern (pro) and northern (anti) lines. *Id.* at 23. The northern counties, with recent settlers from Ohio and the Northeast, turned the tide against the proposed convention. *Id.* at 23-24.

174. *See infra* note 313.

175. In one of those instances, "After submitting their work to the people, [the Kentucky convention of 1891] made material amendments to that constitution as ratified by the people" by adding an entirely new section which went into effect without popular approval. *See Taylor v. Commonwealth*, 44 S.E. 754 (Va. 1903); *Miller v. Johnson*, 18 S.W. 522, 526 (Ky. 1892) (both declining to hold invalid a constitution framed contrary to statutory restrictions because the government and public had acted as if the constitution were valid); *see also Bartley, supra* note 25, at 35 (discussing the South Carolina convention of 1895, which acted on its own initiative).

176. GRATCH & UBIK, *supra* note 168, at 12-13. Jameson's treatise erroneously reports the date as March 5, 1848. JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 651.

177. GRATCH & UBIK, *supra* note 168, at 12.

178. *Id.*

179. *Id.* at 12-13.

180. *Id.* at 13. The amendment would have to have been approved by two successive legislatures. By 1960, only about twelve states had such provisions. Bartley, *supra* note 25, at 24.

181. GRATCH & UBIK, *supra* note 168, at 13.

If approved by a *majority* of the voters, the proposal would become law.<sup>182</sup>

The next Illinois convention was convened in 1862, but its constitution was not approved, no doubt due to the internecine fighting during that convention over Civil War issues.<sup>183</sup> Actually, the Illinois Convention of 1862 was one of the most radical conventions in American political history. Declaring itself "sovereign," it sought to exercise wide powers of governance.<sup>184</sup> Most noteworthy, perhaps, was its initiative in the area of slavery. As a compromise attempt to prevent the outbreak of war, the United States Congress, by a joint resolution on March 2, 1861, proposed the Corwin amendment which would have prohibited any further amendment to the United States Constitution authorizing Congress "to abolish or interfere within any state, with the domestic institutions thereof, including that of persons held to labor or service under the laws thereof."<sup>185</sup> The method of ratification was to be by action of "the legislatures of three-fourths of the several states."<sup>186</sup>

The Illinois legislature failed to ratify the proposed amendment in a vote taken in 1861.<sup>187</sup> The convention of 1862, notwithstanding the fact that they discussed and probably understood the illegality of their efforts, sought to remedy this legislative "oversight" by voting decisively, on February 8, 1862, for a resolution ratifying the Corwin amendment.<sup>188</sup> The vote was based on a completely meritless construction of Article V which says that amendments are valid only "when ratified by the *legislatures* of three-fourths of the states, *or by conventions* in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress."<sup>189</sup> Not to be outdone, the next Illinois legislature ratified the Corwin amendment,

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182. *Id.*

183. *Id.*

184. See CORNELIUS, *supra* note 114, at 47-50 (discussing the extraordinary actions of the 1862 convention).

185. *Id.*; JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 450.

186. JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 450.

187. *Id.* The next legislature, however, did ratify this amendment as prescribed by Congress. *Id.* Illinois, Ohio, and Maryland were the only states to approve this amendment. CORNELIUS, *supra* note 114, at 49 n.11.

188. CORNELIUS, *supra* note 114 at 49 n.11. There was much controversy during the convention over how to respond to newspaper reports that many of the delegates were in "complicity" with a disloyal society, known as the "Knights of the Golden Circle, whose aim was to revolutionize the state." JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 468-69.

189. U.S. CONST. art. V (emphasis added).

as did the legislatures in Ohio and Maryland.<sup>190</sup>

The 1862 convention also took another "legislative" initiative regarding extraneous matters; "with the cooperation of that part of the people to be affected by it, [it attempted] to repeal an Act of the legislature, local in its scope and operation."<sup>191</sup> This action was held invalid, however.<sup>192</sup> There were even discussions about whether the convention could remove from office persons presently holding public office by election or appointment, but the power was never exercised.<sup>193</sup> Regardless, it is easy to see why Illinois legislatures historically have been less than receptive toward the convention process.<sup>194</sup>

The fourth Illinois convention was convened in 1869 and its constitution was adopted on July 2, 1870.<sup>195</sup> Most of the deliberation at the 1869 Convention on the subject of constitutional amending surrounded controversies that arose at that convention. The delegates sought to avoid future conflict over these same matters; e.g., the number and replacement of delegates<sup>196</sup> and the oath to be taken by delegates.<sup>197</sup> Yet even though one of the declared aims of the 1869

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190. CORNELIUS, *supra* note 114, at 49 n.11.

191. JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 431-32 (noting that the act dealt with local police elections) (citation omitted).

192. *Id.* (citation omitted).

193. *Id.* at 320-21. Of course, a convention could abolish existing offices and thus indirectly effect the removal of those who filled them. *Id.*

194. "[A]ll of the members of the [1969-70 Convention were aware] of the historic antagonism of the legislature toward the convention process." GRATCH & UBIK, *supra* note 168, at 22. The question of calling a convention was submitted to referendum by the legislature only six times in Illinois's first 50 years (1824, 1842, 1846, 1856, 1860, 1868), and only three times between 1870 and the present (1918, 1934, 1968). *Id.* n.13. See generally CORNELIUS, *supra* note 114 (discussing the history of Illinois constitution-making).

195. The vote in favor of adoption was 154,227 to 35,443. JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 651.

196. No guidelines existed from 1848 as to replacements for delegates, and when four died and one resigned during the 1869 Convention, the members decided they had the power to order special elections for substitute members, holding three such elections during the 1869 Convention. CORNELIUS, *supra* note 114, at 79 (citation omitted). They ultimately decided that, in the future, vacancies would be filled in the same manner as in the General Assembly. *Id.*

197. The oath was an unusual problem, causing days of debate. Convention enabling legislation containing an oath or other requirements was enacted in Georgia (1833), North Carolina (1835, 1875), and Illinois (1862, 1869). JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 366-67. Before 1887, about 50 percent of the state conventions had administered oaths to delegates before they entered upon their duties. These generally resembled the oath at the 1847 Illinois Convention: "You do solemnly swear, that you will support the Constitution of the United States, and that you will faithfully discharge your duty as delegates to this Convention, for the purpose of revising and amending the Constitution of the State of Illinois." *Id.* at 281. Oath-taking has been controversial. Many conventions, including a few Illinois conventions, fought over whether the oath should contain an additional clause to support the existing constitution of the state as well. *Id.* at 282-86. The question had been uniformly decided in the negative before 1869

Convention was to make alteration of the Illinois Constitution easier,<sup>198</sup> the delegates ended up increasing the difficulty of the process. The 1870 document retained the convention and legislative amendment methods as they had been since 1848, but added another restriction: now, not only could you not propose an amendment to more than one article in each legislative session, but amendments to the same article could not be proposed more than once in four years.<sup>199</sup>

The fifth convention, which adjourned in 1922, resulted in a docu-

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in Louisiana (1844), Ohio (1850), Iowa (1857), and Illinois (1862), even though an oath to this effect was contained in the Illinois enabling legislation. *Id.* The 1862 Illinois delegates — having decided that they could not take the prescribed oath swearing allegiance to the Illinois Constitution — “[a]roused some apprehension, especially among Republican newspapers such as the *Chicago Tribune*, which expressed the opinion that the convention itself was not legal because the members had refused to take the prescribed oath.” OLIVER M. DICKERSON, *THE ILLINOIS CONSTITUTIONAL CONVENTION OF 1862*, at 10-11 (1905).

In 1869 as well, after election of a temporary chairman, three and one-half days were taken up deciding whether or not delegates chosen to “revise, alter, or amend” the Illinois Constitution could properly be required to take an oath to support that constitution. CORNELIUS, *supra* note 114, at 63, 79; 1 *DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS* 391 (1870) [hereinafter *DEBATES*]. The debate was serious, often bitter, and raised and discussed several pertinent questions about the function of conventions and constitutions. JAMESON, *CONSTITUTIONAL CONVENTIONS*, *supra* note 14, at 558. The same fundamental argument was raised as in 1862: one could not in good faith swear to support a constitution that one was there to change. Ultimately, the delegates decided there would be no real inconsistency between swearing to uphold the Illinois Constitution and functioning as a member of the convention. Delegates would not be swearing to uphold the *written* instrument — this was just the evidence of organic growth up to the last convention — but the organic growth itself (the actual “constitution”). 1 *DEBATES*, *supra*, at 391; JAMESON, *CONSTITUTIONAL CONVENTIONS*, *supra* note 14, at 285. The delegates’ job is to conform the old constitution to the present constitution and interpretation. JAMESON, *CONSTITUTIONAL CONVENTIONS*, *supra* note 14, at 285. Still, others feared the excesses possible (as in 1862) if delegates did not first declare allegiance to certain principles or controls. CORNELIUS, *supra* note 114, at 63-64. A convention is “an elementary body, deriving its authority from no source; that absolute sovereignty and paramount authority were the attributes of such a body; . . . [it] was, as it were, the people *en masse*.” 1 *DEBATES*, *supra*, at 10-11 (comments of Delegate William Archer). After a final stormy session, the delegates agreed to make the oath voluntary. CORNELIUS, *supra* note 114, at 63-64. To avoid this problem in the future, the 1870 delegates provided explicitly for an oath which included a commitment to the Illinois Constitution. The issue did not arise during the 1920 or 1970 Conventions. *Id.* at 79, 102.

198. *Cornelius*, *supra* note 114, at 79.

199. ILL. CONST. of 1870, art. XIV, § 2 (amended 1970). Delegate John Dement, arguing in favor of allowing at least two articles to be amended at one session, accused other members of distrusting future voters. *Cornelius*, *supra* note 114, at 80. The majority of the delegates, however, actually distrusted the legislature. They agreed with one delegate who feared that they “would have the Legislature, half of its time, perhaps, engaged in framing proposed amendments.” *Id.* at 80. Delegate George Wait said that “the Legislature, in a very short time, could entirely demolish our constitution, build up a new one on its ruins, and thus make our organic law as unstable as the desert sands.” *Id.* at 80-81.

ment that was ultimately defeated at the polls.<sup>200</sup> One of the major reasons for the failure of the 1922 Convention was the many frustrating recesses in the convention's work caused by conflict over the popular initiative; officially in session for two years and nine months, the delegates spent only 140 days in actual convention work.<sup>201</sup> The proposed 1922 Constitution failed overwhelmingly at the polls in large measure due to the failure of the delegates to include a popular initiative provision.<sup>202</sup> In fact, there "is no record in the history of American politics that equals this for an uprising of the people at the ballot box on a local issue."<sup>203</sup>

The amending article was eventually revised through the 1950 Gateway Amendment,<sup>204</sup> which eased the revision process. The Gateway Amendment provided an alternative to the 1870 constitutional requirement of voter ratification of an amendment by a "majority voting in the election." Now, approval by two-thirds of those voting on the measure would also suffice, regardless of whether a majority of those voting for members of the General Assembly could be obtained.<sup>205</sup> Further, the Gateway Amendment allowed the General Assembly to propose amendments to three articles at the same session and required that all amendments proposed be printed on a separate blue ballot.<sup>206</sup>

Popular approval of the Gateway Amendment generated widespread hope that revision by amendment would once again become a feasible method for initiating constitutional change. Gateway was the first amendment adopted since 1908<sup>207</sup> and was a partial success

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200. The document was overwhelmingly *rejected* by a vote of 921,398 to 185,298. GRATCH & UBIK, *supra* note 168, at 16.

201. CORNELIUS, *supra* note 114, at 103-05.

202. *Id.*

203. *Id.* at 115.

204. *See id.* at 121-46. The Gateway Amendment was a republican alternative to a strong effort by Governor Adlai Stevenson in 1949 to place a convention call on the ballot. He lost by two votes in the House and ultimately accepted the compromise of an amendment which at least made it easier for future amendments to be passed (hence the name "Gateway"). *Id.* at 122-24. Governor Stevenson announced his support and said:

I doubt the sincerity of the "Gateway proposal" . . . . It looks like an effort to dodge responsibility for blocking much-needed changes. . . . But in spite of my misgivings, I feel it is better to have something than nothing. . . . I will urge the Democratic party in an all-out nonpartisan effort to secure ratification of the Gateway Amendment by the votes in 1950.

*Id.* at 124.

205. GRATCH & UBIK, *supra* note 168, at 13.

206. *Id.*

207. CORNELIUS, *supra* note 114, at 125.

during the first legislative session after its passage.<sup>208</sup> At the next session, the legislature attempted to resolve the difficult question of reapportionment, and a reapportionment amendment backed strongly by then-Governor William Stratton passed through the General Assembly.<sup>209</sup> The voters approved the proposal in November of 1954. It provided that if the legislature did not redistrict, then the task would go to a commission, and if that did not produce redistricting, then all members of the intransigent chamber would have to be elected at-large in the state. Of course, that is exactly what happened in 1964 when all 177 representatives were forced to run at-large. It was just such a relatively independent cohort — a class of legislators not beholden to district partisans or constituencies — that might finally be convinced to seriously consider proposing a constitutional convention. In fact, but for this and other fortuitous circumstances,<sup>210</sup> the coming 1970 Constitutional Convention might not have been proposed, and the resulting document might never have been adopted.<sup>211</sup>

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208. The first two proposals after the Gateway Amendment were defeated, but the second two passed under the new Gateway requirement. *Id.* at 126.

209. *Id.* at 127.

210. Fortunately, one of those elected to the House in the 1964 election was Ms. Marjorie Pebworth, former president of the League of Women Voters. "She recommended the formation of the Constitution Study Commission to the General Assembly and in 1965 became its first chairman. [T]he commission recommended that the General Assembly place the question of calling a constitutional convention on the ballot in the November 1968 general election." *Id.* No other amendment would be placed on the ballot. "The success of the convention call in the General Assembly rested primarily on two factors. One was the desire of the members to honor the memory of Mrs. Pebworth, who died suddenly during her second term in the House of Representatives. Her dedicated and energetic efforts on behalf of the convention call were widely recognized, and passage of the convention resolution was in large part a tribute to her efforts. Secondly, many members were apparently willing to vote for the measure because they felt its chances for popular approval were slim." *Id.* at 140.

211. The vote in favor of the proposal was 1,222,425 to 838,168. SAMUEL K. GOVE & THOMAS R. KITSOS, *REVISION SUCCESS: THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION* 134 (1974). Not all products of state constitutional conventions have been as readily accepted by their electorates. See STURM, *MODERNIZING CONSTITUTIONS*, *supra* note 157, at 12 (providing examples of revisions proposed by state constitutional conventions that were not accepted by voters); Adrian, *supra* note 39, at 312 (providing a table of state constitutional amendments that have been presented for a vote); Lewis B. Kaden, *The People: No! Some Observations on the 1967 New York Constitutional Convention*, 5 HARV. J. ON LEGIS. 343 (1968) (discussing the failure of the New York Charter proposed by the state's ninth constitutional convention).

There were specific reasons for Illinois's success in 1970. Although most conventions write new constitutions which must be presented to the voters for approval, if the new constitution is proposed as a whole, passage has proven less likely if there are controversial new sections. STURM, *MODERNIZING CONSTITUTIONS*, *supra* note 157, at 10. One of the reasons that the 1970 Illinois Constitution was approved by the voters was that four controversial changes simply were not included in the proposed constitution: (1) the issue of cumulative voting versus single-member dis-



Article 14, Section 1 of the Illinois Constitution of 1970 sets out the present procedures for calling a constitutional convention.<sup>212</sup> The

stricts; (2) the so-called "merit" appointment of judges; (3) the abolition of the death penalty; and (4) the lowering of the voting age to eighteen. These matters were voted upon as separate proposed amendments; all four provisions were rejected by the voters. GOVE & KITSOS, *supra*, at 218. The 1870 Constitution was also submitted with eight separate propositions, and all eight were adopted with the constitution by substantial majorities — but the party circle ballot, in use at that time, made non-voting virtually impossible. See CORNELIUS, *supra* note 114, at 83. There were several obvious advantages to submitting the 1970 Constitution to a vote without the four controversial provisions: (1) it prevented the convention from breaking up over highly emotional issues; and (2) it significantly increased the chances of the constitution being accepted by the voters. *Id.* at 154; see also Levine, *supra* note 14, at 387 n.4 (quoting Samuel W. Witwer, president of the 1970 Constitutional Convention: "We tried to write the best constitution which could be adopted."). Also of vital importance was the fact that the 1870 Constitution gave future conventions the authority to designate the kind of election at which proposals would be submitted to the voters. ILL. CONST. of 1870, art. XIV, § 1 (amended 1970) ("[Proposals s]hall be submitted to electors . . . at an election appointed by the Convention for that purpose . . ."). By calling a special election for the sole purpose of voting on the 1970 Convention's proposals, all voters were able to cast ballots, overcoming what had previously been the difficult task of gaining the votes for necessary approval of the amendments under the 1870 Constitution. GRATCH & UBIK, *supra* note 168, at 26-27. The 1870 Constitution was *also* adopted at a special election on July 2, 1870. CORNELIUS, *supra* note 114, at 83. It would therefore seem that the structural "intent" of the 1870 document was to make it easier to revise the entire constitution, or portions thereof, by convention rather than by legislative initiative. No such choice in the timing of an election is available to a General Assembly proposing an amendment. See ILL. CONST. of 1970, art. XIV, § 2(a) (mandating that the legislature submit amendments to voters at the next general election at least six months after legislative approval).

212. ILL. CONST. of 1970, art. XIV, § 1. This article provides:

(a) Whenever three-fifths of the members elected to each house of the General Assembly so direct, the question of whether a Constitutional Convention should be called shall be submitted to the electors at the general election next occurring at least six months after such legislative direction.

(b) If the question of whether a Convention should be called is not submitted during any twenty-year period, the Secretary of State shall submit such question at the general election in the twentieth year following the last submission.

(c) The vote on whether to call a Convention shall be on a separate ballot. A Convention shall be called if approved by three-fifths of those voting on the question or a majority of those voting in the election.

(d) The General Assembly, at the session following approval by the electors, by law shall provide for the Convention and for the election of two delegates from each Legislative District; designate the time and place of the Convention's first meeting which shall be within three months after the election of delegates; fix and provide for the pay of delegates and officers; and provide for expenses necessarily incurred by the Convention.

(e) To be eligible to be a delegate a person must meet the same eligibility requirements as a member of the General Assembly. Vacancies shall be filled as provided by law.

(f) The Convention shall prepare such revision of or amendments to the Constitution as it deems necessary. Any proposed revision or amendments approved by a majority of the delegates elected shall be submitted to the electors in such manner as the Convention determines, at an election designated or called by the Convention occurring not less than two nor more than six months after the Convention's adjournment.

most important provision is subsection (a), which provides that "[w]henever three-fifths of the members elected to each house of the General Assembly so direct, the question of whether a constitutional convention should be called shall be submitted to the voters at the next occurring" general election, provided that the election is "at least six months after [the] legislative direction."<sup>213</sup> The required legislative majority for a convention call was reduced in 1970 from two-thirds to three-fifths. Now a call is approved when "three-fifths of those voting on the question, or a majority of those voting in the election, vote for the proposal."<sup>214</sup> This was considered a significant step toward greater constitutional flexibility,<sup>215</sup> but it was largely symbolic.

There was little historical evidence to support the view that such a change would make it easier to obtain voter approval of convention calls. Regardless of how well organized the campaigns are for or against a certain constitutional reform, voter approval is still difficult because:

[Convention politics] almost invariably revolve around the issue of the maintenance of the status quo versus change. . . . [T]he least recognized aspect in the whole area of constitutional revision is that there are people and

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Any revision or amendments proposed by the Convention shall be published with explanations, as the Convention provides, at least one month preceding the election.

(g) The vote on the proposed revision or amendments shall be on a separate ballot. Any proposed revision or amendments shall become effective, as the Convention provides, if approved by a majority of those voting on the question.

*Id.*

The parallel article of the federal Constitution, Article V, reads as follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses of the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

213. ILL. CONST. of 1970, art. XIV, § 1(a).

214. ILL. CONST. of 1970, art. XIV, § 1(c).

215. The three-fifths requirement seemed to be a reasonable effort toward flexibility because Illinois's population in 1970 was divided almost equally into three discrete geographic and political groups — each with interests and goals in common: (1) Chicago; (2) the suburbs of Chicago (suburban Cook and the five "collar" counties); and (3) "downstate" (the ninety-six other counties). The old two-thirds requirement allowed just one of these segments of the state's population to "frustrate the will of the other two." *E.g.*, Lousin, *supra* note 118, at 8.

groups who do not want change. . . . [I]t is really change versus non-change that divides most conventions.<sup>216</sup>

When the question of calling a convention was before the Illinois voters in 1856,<sup>217</sup> a majority of those voting on the question voted for it, but they still represented less than a third of the state-wide number who voted for Governor.<sup>218</sup> The call was defeated decisively under the restrictive two-thirds majority required under the 1848 (and 1870) Constitution,<sup>219</sup> and would have been defeated under the present 1970 requirements as well. Similarly, when a convention call was placed on the ballot in 1934, it also failed, primarily because newspapers campaigned actively against the call.<sup>220</sup> Once again, though the call received a majority of the votes of those voting on the question, 56½ percent of the voters in the general election simply failed to vote on the call.<sup>221</sup>

Only the election of 1824 differs from the three other unsuccessful proposals for calling Illinois constitutional conventions (1842, 1856, 1934) in that a majority of voters on the question in 1824 actually voted *against* the call. The 1824 call was defeated over a specific issue, slavery,<sup>222</sup> while the other calls were defeated by voter apathy. Even with the help of strong gubernatorial and legislative backing, as well as active newspaper support, the 1868 call (resulting in the 1869-1870 Constitutional Convention) was approved by only a bare majority of 726 votes.<sup>223</sup>

Fortunately, due in large part to the 1964 at-large legislative elections,<sup>224</sup> there was a sufficient legislative majority to enact the 1968 convention call; and in response to a unique and extremely well organized campaign, the 1968 call prevailed by a count of 2,979,977 votes to 1,135,440 votes.<sup>225</sup> Such emphatic support was quite un-

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216. CORNWELL ET AL., *POLITICS OF REVISION*, *supra* note 23, at 19-20.

217. CORNELIUS, *supra* note 114, at 45.

218. *Id.* at 45-46.

219. *Id.* at 46.

220. The Chicago Tribune was the most vocal in its opposition, claiming that "[t]he Convention would provide just such troubled waters as Communists and Fascists most desire. They could ask no better opportunity to destroy free government." *Id.* at 119. Thus, public apathy and ignorance, "perhaps aided by the fear of radicalism and the dislike of spending money for a convention, were the apparent causes for its defeat." *Id.* (citation omitted).

221. *Id.* at 118-19.

222. *Id.* at 23.

223. *Id.* at 58-59.

224. See *supra* notes 210-11 and accompanying text.

225. GRATCH & UBIK, *supra* note 168, at xi.

usual. Compared to other political issues, constitutional reform generally escapes voter interest. It is boring and the issues are usually abstract, complex, and affect the voter only indirectly.<sup>226</sup> As one writer has noted:

[Constitutional r]eform tends to come and be accepted most readily when it is dictated by severe need. . . . If those concerned with revision can piggy-back their efforts to win approval of a convention on some rather obvious and pressing need, they obtain a powerful assist. [On] the other hand, . . . [it] is difficult in the extreme to persuade an electorate [that a] reformed court system . . . is really worth getting excited about.<sup>227</sup>

Moreover, voters, indoctrinated throughout their lives with the importance of constitutions as fundamental charters, are understandably reluctant to engage in wholesale change:

Negative majorities, insofar as we understand their composition and motivation, are made up of those who fear change in some generalized way, or have been persuaded that one specific provision, marginal to the grand scheme, like excision of a lottery ban . . . justifies rejection. . . . [There] is a presumption against change in the voter's mind.<sup>228</sup>

When one adds to this "presumption" the requirement that a majority of all those voting *at the election* must vote for a convention, a "negative minority" is easily garnered to stop revision or amendment by convention. Consequently, although it is somewhat hyperbolic to say so, it is largely true that a state with a "super-majority" requirement on the call question "might as well give up all thought of ever holding a convention."<sup>229</sup>

"Majority voting at the election" requirements for convention questions such as that in the Illinois Constitution have not always raised real problems. When the original super-majority requirement was placed in that document, voting among the few frontiersmen who arrived at the polling places throughout the state was *viva voce*, and every voter voted on all referenda.<sup>230</sup> However, "since the adoption of the printed and secret ballot [and] lists of registered voters, only those really interested in referenda vote on them, and many, being ignorant or uninterested, ignore them."<sup>231</sup> It has become sim-

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226. *Id.* at x.

227. CORNWELL ET AL., *POLITICS OF REVISION*, *supra* note 23, at 7.

228. *Id.* at xi (emphasis added).

229. DEALY, *supra* note 15, at 144. This observation was made in reference to Illinois, in particular, as well as a few other similarly-situated states. *Id.*

230. *Id.* n.1.

231. *Id.*

ply impossible, therefore, to get a total vote on a referendum much larger than about one-half to two-thirds of the number of people who vote at the general election.<sup>232</sup> Of course there are a variety of reasons why it is important to avoid having too small a majority of the general public authorize what might be hasty, excessive, or partisan-driven large-scale change.<sup>233</sup> Nevertheless, only requiring a simple majority on the question of the call would still legitimize that call, authorizing a convention at the hands of at least one-sixth to one-third of the voters. This is certainly a large and reliable enough sample of public opinion.<sup>234</sup> Moreover, there would already be sufficient protection against hasty or ill-considered action, since a legislative "super-majority" would still be required to put the convention question before the voters in the first place.

There were other significant gestures toward reform evident in the 1970 document. Subsection (1)(c) of Article XIV reinforced the historically significant requirement that the question of calling a convention be placed on a separate ballot.<sup>235</sup> Subsection (1)(b), however, added the new requirement that, if not otherwise submitted by the General Assembly, the question of whether a convention should be called *must* be submitted to the electorate every twentieth year.<sup>236</sup> This was an important innovation in Illinois.<sup>237</sup> Actually,

232. See DODD, REVISION AND AMENDMENT, *supra* note 15, at 52-54 (claiming that the difficulty in obtaining sufficient votes for the required majority of those voting at a general election is due to the lack of interest in the matter proposed).

233. See, e.g., JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 552-53 (noting that if the required majority is too small, proposed amendments could assume a partisan character, giving the voters free rein to change "organic laws" and thereby jeopardizing their stability).

234. DODD, REVISION AND AMENDMENT, *supra* note 15, at 53-54. Another alternative might be a measure similar to the 1891 Kentucky provision: a call passes if the votes equal at least one-quarter of the qualified voters. This lodges power in those representing a significant enough sample to reasonably "represent the intelligent public opinion of the community." *Id.*

235. See Rita M. Kopp, *The Illinois Constitution: An Orientation*, 17 DEPAUL L. REV. 480, 487 (1968) (noting that the "separate ballot" provision was a part of the important Gateway Amendment finally passed in 1950). For further discussion, see notes 408-14 and accompanying text (discussing the Gateway Amendment's separate ballot requirement).

236. ILL. CONST. of 1970, art. XIV, § (1)(b). It is generally believed that legislative enactment of a convention call referendum in Illinois would not require gubernatorial approval. DODD, REVISION AND AMENDMENT, *supra* note 15, at 56-57 n.55. Yet in Nebraska, where this also was assumed to be true, a joint resolution of 1903 to this effect was vetoed by the Governor after adjournment of the legislature. No further action was taken. *Id.*

237. The first provisions for submitting a convention call to the general public were found in the constitutions of Delaware (1792), Tennessee (1796), Kentucky (1799), and Ohio (1802). DODD, REVISION AND AMENDMENT, *supra* note 15, at 48. Submitting convention questions to the public was the practice in twenty-six states (including Illinois) by 1910. Sixteen of those states (including Illinois) required a two-thirds legislative majority for submission, while the others required a three-fifths vote (Nebraska) or a simple majority. *Id.* at 48-49. These submissions were

the notion that it is important for the people to periodically review their constitutions came to the United States from John Locke via George Mason;<sup>238</sup> the idea that this periodic review ought to be *mandatory* really should be attributed to Machiavelli via the radical republicans of the early Republic.<sup>239</sup> Nevertheless, it is Thomas Jefferson who usually gets the credit. He wrote:

I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change in circumstances, institutions must advance also, and keep pace with the times. . . . [Each generation has] a right to choose for itself the form of government it believes most promotive of its happiness . . . [A] solemn opportunity for doing this every nineteen or twenty years, should be provided by the constitution; . . . .<sup>240</sup>

The New Hampshire Constitution of 1792 was the first constitution to require the submission of the convention call question to the people at regular intervals — every seven years.<sup>241</sup> Indiana followed in 1816, requiring a submission every twelve years.<sup>242</sup> It is surprising that a provision similar to Indiana's was not added to the 1848 Illi-

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not mandatory, but were to be made at the discretion of the legislature.

238. George Mason expressed John Locke's notion of a right to revolution in the Virginia Bill of Rights (1776): "[W]hen any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal." VA. CONST. art. I, § 5 (1776).

239. See *Four Letters on Interesting Subjects, Letter IV* (Philadelphia, 1776), reprinted in AMERICAN CONSTITUTION, *supra* note 66, at 8 ("[t]he Anonymous author of this [widely published] treatise had considerable knowledge of the law and must have been a radical republican"). It states:

"I wish," says Lord Camden, "that the maxim of Machiaveli was followed, that of examining a Constitution, at certain periods, according to its first principles; this would correct abuses, and supply defects. . . ." [S]ome article in the Constitution may provide, that at the expiration of every seven or any other number of years a *Provincial Jury* shall be elected, to enquire if any inroads have been made in the Constitution, and to have power to remove them; but not make alterations, unless a clear majority of all the inhabitants shall so direct.

*Id.*

240. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), reprinted in 10 JEFFERSON WRITINGS, *supra* note 66, at 42-43. These thoughts are commonly referred to as the "domestication" of a right to revolution.

241. DODD, REVISION AND AMENDMENT, *supra* note 15, at 50.

242. *Id.*

nois Constitution.<sup>243</sup> New York's constitution of 1846, by comparison, followed the lead of Massachusetts, New Hampshire, and Indiana in requiring submission of the question at regular intervals — in New York's case, every twenty years.<sup>244</sup> In the 1850s, Illinois's neighboring states of Michigan, Ohio, and Iowa, in addition to Maryland, also adopted this kind of provision.<sup>245</sup> Moreover:

Periodic[, automatic] submission to the people of the convention question would appear to be consistent with the principle of increased popular participation in government embodied in the greater elective power established in the 1848 [Illinois] constitution; however, there is no evidence that it was seriously considered by Illinois constitution makers.<sup>246</sup>

This fact might tend to reinforce the assumption that the Illinois convention intended a more inflexible document than those upon which it was modeled or those desired by delegates in neighboring Midwestern states. Still, only six states required periodic submission by 1910,<sup>247</sup> and even by 1960 only eleven states required submission of convention call questions (usually by the legislature) at regular intervals.<sup>248</sup> Thus, the lack of a mandatory periodic convention call referendum provision before 1970 placed Illinois outside the historic mainstream regionally, but not nationally. There were also problems with these provisions. Requirements for mandatory referenda were ignored by the legislatures in a number of cases over the years, and there was no legal recourse.<sup>249</sup> This caused many who drafted constitutions after 1960 to make periodic submission of the call question an administrative rather than a legislative responsibility. Among the states that took this course of action were Alaska, which

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243. It was not adopted by the 1818 Illinois Constitutional Convention even though that convention had the Indiana amending provision before it. *See supra* notes 171-72 and accompanying text (discussing the relationship between the Illinois and Indiana constitutions at this time).

244. DODD, REVISION AND AMENDMENT, *supra* note 15, at 51.

245. Robert J. Martineau, *The Mandatory Referendum on Calling a State Constitutional Convention: Enforcing the People's Right to Reform their Government*, 31 OHIO ST. L.J. 421, 424 n.18 (1970). *See generally* THORPE, *supra* note 171 (vols. 1-7) (outlining federal and state constitutions).

246. CORNELIUS, *supra* note 114, at 41.

247. DODD, REVISION AND AMENDMENT, *supra* note 15, at 51. By 1910, states with automatic submission of convention call questions included Iowa (10 years); Michigan (16 years); and Maryland, New York, and Ohio (20 years). *Id.* The 1780 Massachusetts Constitution was the first to provide, in 1975, for submission of the convention call question to the people. *Id.* at 43. The New Hampshire Constitution of 1784 provided that a convention would be called in seven years if a popular vote at that time favored such action. However, periodic submission was not thereafter required in that state. *Id.* at 50.

248. Bartley, *supra* note 25, at 25.

249. *Id.* at 35.

made the Secretary of State responsible for initiating a call, and Hawaii, which made the Lieutenant Governor responsible for initiating a call.<sup>250</sup>

The 1970 convention in Illinois also decided not to give the General Assembly the exclusive right to initiate a convention call.<sup>251</sup> This resulted from a mistrust of the legislature and a general awareness of the "historic antagonism of the legislature toward the convention process."<sup>252</sup> After much discussion, the Committee on Amending and Suffrage decided to place the convention call question before the electorate automatically at regular intervals<sup>253</sup> of twenty years<sup>254</sup> as an alternative to legislative action. Fourteen states now require periodic submission; eight of them, including Illinois, have provisions calling for twenty-year intervals.<sup>255</sup>

This is yet another reform that may mean little in terms of increased constitutional flexibility. While it was thought that a mandatory convention call would bypass the legislature at the initial stage of the process<sup>256</sup> and thereby increase the frequency and ease with which the Illinois constitution could be amended,<sup>257</sup> this has not proven to be true. The first automatic twenty-year convention call, on November 8, 1988, failed overwhelmingly at the polls by a margin of almost three to one.<sup>258</sup>

The 1970 Constitution provides that should the voters approve the convention call question,<sup>259</sup> the General Assembly has the responsi-

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250. *Id.* at 33.

251. GRATCH & UBIK, *supra* note 168, at 22.

252. See *supra* note 194 and accompanying text (discussing the relative infrequency of legislatively-proposed convention call elections).

253. GRATCH & UBIK, *supra* note 168, at 22.

254. *Id.* One of the forty-one Suffrage and Constitutional Amendment Committee witnesses at the 1970 Convention, Professor Stanley Erikson, specifically suggested an automatic call every 15 or 20 years. *Id.* at 17.

255. STURM & MAY, *supra* note 96, at 138. The fourteen states and their automatic submission periods are: Hawaii (9 years); Alaska, Iowa, New Hampshire, and Rhode Island (10 years); Michigan (16 years); and Connecticut, Illinois, Maryland, Missouri, Montana, New York, Ohio, and Oklahoma (20 years). *Id.*

256. Constitutional provisions which require that the question of calling a convention be submitted periodically to the electorate obviously bypass the legislature at the initial stage of the procedure — the stage at which the legislature has the power to vote to place the call on the ballot. Henry D. Levine, Note, *Limited Federal Constitutional Conventions: Implications of the State Experience*, 11 HARV. J. ON LEGIS. 127, 131 (1973).

257. May, *supra* note 11, at 156 ("Overall, most convention calls are approved, but the automatic calls are frequently rejected.").

258. *Tuesday's Ledger of Winners, Losers*, CHI. TRIB., Nov. 10, 1988, §1, at 26.

259. The Georgia Constitution of 1777 was the first to require action by the people for the calling of a convention. It was also the first to allow popular initiative to this end, but the provision



bility for enacting enabling legislation for the convention.<sup>260</sup> The legislative authority, however, does not include the power to limit the scope of subjects to be discussed at the convention unless the electorate first votes for such limitations.<sup>261</sup> Enabling legislation may cover the financing of the convention; the manner of electing delegates,<sup>262</sup> including their qualifications;<sup>263</sup> and the basis of represen-

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was never implemented, probably because it was too cumbersome. DODD, REVISION AND AMENDMENT, *supra* note 15, at 42, 48. By 1910, the practice of obtaining popular approval for the calling of a convention was virtually a settled rule: thirty-two states required such approval and, even where it was not required, a popular vote was taken on most calls. *Id.* at 51.

260. ILL. CONST. of 1970, art. XIV, § 1(d). However, the obligation of the General Assembly to enact the required enabling legislation may be unenforceable because it is unlikely that mandamus would be issued against the legislature. Dale A. Kimball, Note, *The Constitutional Convention, It's Nature and Powers — And the Amending Procedure*, 1966 UTAH L. REV. 390, 397; Note, *Constitutional Change*, *supra* note 33, at 1008; see also Wells v. Bain, 75 Pa. 39, 50-51 (1874) (noting that enabling legislation was "not in itself a call" for a convention, but that the legislature "might call" a convention). The legislature refused to pass a bill to convene a convention in Maryland after voters approved a convention call in 1950. In 1886, the "popular vote" taken in New York (under the 1846 Constitution, which required a vote on a call every twenty years) overwhelmingly favored calling a constitutional convention. Yet a disagreement between the legislature and the Governor, each with different party affiliations, made it impossible to obtain passage of a law authorizing the convention until 1894. DODD, REVISION AND AMENDMENT, *supra* note 15, at 55. A similar situation occurred in New Hampshire in 1860 and 1864. *Id.* n.53 (citing JAMES F. COLBY, MANUAL OF THE CONSTITUTION OF THE STATE OF NEW HAMPSHIRE 218 (1902)). Even if enabling legislation is enacted, the governor may still veto that law. Legislation providing for a convention call probably would not require gubernatorial approval; but the enabling legislation for the convention probably would require such approval. *Id.* at 56-57 n.55.

261. Congress is given similar responsibility for providing enabling legislation for a federal constitutional convention. In the recent past, similar questions have arisen as to whether this responsibility also gives Congress the power to limit the scope of a convention. It has been suggested that since the Article V convention method was designed as an alternative amending process for use by the states in the event that Congress became oppressive, Congress itself must not have the power to limit the scope of the convention's deliberations and actions. Instead, such scholars argue that Congress only has the power to legislate over housekeeping matters. Douglas G. Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D. L. REV. 355, 395 (1979); see also *infra* notes 282-92 and accompanying text (discussing the question of whether Congress could limit a convention even if the thirty-four state applications were all confined to a single topic or issue).

262. This is an important opportunity for the legislature to influence the outcome of the convention. For example, election of delegates for the 1970 Illinois Convention was largely nonpartisan. 1969 Ill. Laws 76-40. Historically, nonpartisan delegate elections have contributed toward the success of constitutional conventions in Illinois. Partisan conventions, however, have been a bad idea on the whole. See CORNELIUS, *supra* note 114, at 97-99 (claiming that "[p]artisanship had been a major cause for the defeat of the 1862 constitution"); *Id.* at 145-47 (suggesting that "[t]he non-partisan [sic] method . . . contributed greatly to the individuality and diversity of the convention delegation"); CORNWELL ET AL., POLITICS OF REVISION, *supra* note 23, at 15 ("To the extent that conventions appear political and operate like normal legislatures (which rarely have favorable public images), they will fall far short of the ideal they are expected to approximate and undercut their claim on public support or approval."). See generally Note, *Constitutional Change*, *supra* note 33, at 1016-22 (discussing a partisan versus nonpartisan basis for elections and supporting the use of nonpartisan elections). Consequently, nonpartisan elections are the most common

tation.<sup>264</sup> Experience has shown, however, that it is safer to specify in the constitution the basis of representation in the convention: It

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method for selecting delegates to modern conventions. May, *supra* note 11, at 157; *see also* *Livingston v. Ogilvie*, 250 N.E.2d 138, 145 (Ill. 1969) (upholding nonpartisan elections).

Illinois legislatures have generally taken the high road in conforming to national norms in this area. The problem at the time of the 1920 convention was that, due largely to an Attorney General's opinion (which has never been found), it was thought that delegates could not be elected on a nonpartisan basis. GEORGE E. BRADEN & RUBIN G. COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* 559 (1969). By 1970, however, the convention's Committee on Suffrage and Constitutional Amendment was fully prepared to require — at least in the original § 1(d) in the 1970 Constitution — that delegates be elected on a nonpartisan ballot. This was dropped on second reading because the delegates felt that including such a provision directly in the constitution was too restrictive and that such details should be left to enabling or implementing legislation. GRATCH & UBIK, *supra* note 168, at 52.

263. In order to become a delegate in Illinois, a person "must meet the same eligibility requirements as a member of the General Assembly." ILL. CONST. of 1970, art. XIV, § 1(e). *See generally* Note, *State Constitutional Conventions: Limitation on Their Powers*, 55 IOWA L. REV. 244, 254-58 (1969) (discussing the subject of delegate qualifications and selection). The 1870 Illinois Constitution required delegates to satisfy the same requirements as members of the Illinois Senate. ILL. CONST. of 1870, art. XIV, § 1 (amended 1970). Article IV, § 3 of that constitution prohibited persons who held "any lucrative" state or federal offices from taking seats in the Illinois Senate. *Id.* art. IV, § 3. The enabling act for the 1970 Convention provided that legislators and other public officials who were otherwise qualified could serve, but they would receive no salary from the convention — and thus would not become "lucrative" office holders. 1969 Ill. Laws 76-40. In *Livingston v. Ogilvie*, 250 N.E.2d 138 (Ill. 1969), opponents of dual office-holding argued that because of article IV, § 3, a person holding another "state or federal office" could not run for or be seated as a convention delegate. *Ogilvie*, 250 N.E.2d at 141. The Illinois Supreme Court upheld the legislative enabling acts as written on the ground that a convention delegate was not a lucrative state "officer." *Id.* at 143. *But see* *Forty-Second Legislative Assembly v. Lennon*, 481 P.2d 330, 334 (Mont. 1971) (upholding the exclusion of certain public officials as delegates by determining that the "public position of delegate" is that of a "public office"); *see also* BRADEN & COHN, *supra* note 262, at 560-61 (suggesting that the court's conclusion was clear enough in *Livingston*, but "by a route most confusing"). This compromise represented by Public Act 76-40 eventually worked its way into the present constitution, even though the 1970 Committee on Suffrage and Constitutional Amendment largely believed that delegates should not hold other offices. GRATCH & UBIK, *supra* note 168, at 24-25. It became clear that even if delegates had other part-time official jobs, they were often valuable to the convention and should be kept. *Id.*

A related controversy arose in the Illinois Convention of 1862. Delegate O'Melveny had been a judge within one year prior to having been elected a convention delegate. *Id.* The earlier constitution had provided that judges should not be eligible "to hold any other office, for public trust or profit" in the state during the term of office and for one year thereafter. ILL. CONST. of 1848, art. V, § 10 (amended 1970). O'Melveny's credentials as delegate were challenged on that basis. At first, the convention voted to allow him to retain his seat. On a motion to reconsider, those for his retention argued that a convention delegate was not an "office or public trust" inasmuch as they were not controlled by the constitution and were not part of any of the three branches of government. Those against him argued that, at the very least, a delegate was occupying a "public trust" as public officials are not mentioned in the constitution. JAMESON, *CONSTITUTIONAL CONVENTIONS*, *supra* note 14, at 317-19. In discussing this event at the 1862 Convention, Judge Jameson concluded that delegates are officers of the state because they are "part of the apparatus by which a sovereign society does its work as a political organism." *Id.* at 319.

264. *See supra* note 196 and accompanying text (discussing how the 1869 Convention sought to end conflict over the number and replacement of delegates).

should never be the same as the legislature itself.<sup>265</sup> By 1915, seventeen state constitutions used the state house of representatives as a basis for representation at their conventions. Illinois was one of only three states requiring that it be twice the number in the state senate, while two other states required different multiples of the size of the senate.<sup>266</sup> The 1970 Illinois Constitution requires the General Assembly to provide in the enabling legislation for the election of two delegates from each legislative district.<sup>267</sup> To the extent that the Illinois Senate comports with the Equal Protection Clause of the Constitution, so would the next constitutional convention.<sup>268</sup>

Once the convention has been called and the delegates selected, the convention is charged with preparing "such revision of or amendments to the Constitution *as it deems necessary*."<sup>269</sup> The question, though, is whether the convention can be instructed *in advance*, by the enabling legislature or the citizens voting for the convention call, on what is "necessary?" In other words, can a conven-

265. ROGER S. HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS 79-88 (1917).

266. *Id.*

267. ILL. CONST. of 1970, art. XIV, § 1(d). In essence, this provision results in a convention composed of 118 delegates, or twice the number of state senators.

268. Of course, the question might not arise, since a constitutional convention may not need to conform to the "one-man, one-vote" rule:

If a convention could proclaim a revised constitution, there would be little doubt that it would be held to be subject to the one-man, one-vote rule. But where . . . no proposal of a convention can take effect until approved by the people in referendum, the matter is not so clear.

2 A. E. "DICK" HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1184 (1974) [hereinafter HOWARD, COMMENTARIES]. In Illinois, it has been held that the "one-man, one-vote" principle is not relevant to constitutional conventions because conventions do no more than present proposals to the voters. *Livingston v. Ogilvie*, 250 N.E.2d 138, 146 (Ill. 1969); *accord Bates v. Edwards*, 294 So. 2d 532, 534 (La. 1974) (sustaining convention call for the Louisiana Convention of 1973-74, notwithstanding a lack of a popular call and a mixture of elected and appointed delegates), *appeal dismissed*, 419 U.S. 811 (1974). The "one-man, one-vote" principle may apply to convention delegate elections only if the state constitutional law permits constitutions drafted by conventions to take effect without popular ratification. *Hadley v. Junior College Dist.*, 397 U.S. 50, 59 (1970); *Fortson v. Toombs*, 379 U.S. 621, 626 (1965). In the absence of a constitutional provision specifically entitling state citizens to equal apportionment, state courts disagree. *E.g.*, W. VA. CONST. art. II, § 4; *West Virginia ex rel. Smith v. Gore*, 143 S.E.2d 791, 794 (W. Va. 1965) (holding unconstitutional the practice of allocating delegates to a convention by legislative act without providing for equality of representation). *Compare Jackman v. Bodine*, 205 A.2d 713, 724 (N.J. 1964) (invalidating a legislative article dealing with the apportionment of members of the legislature) *with West v. Carr*, 370 S.W.2d 469, 474 (Tenn. 1963) (upholding a provision permitting legislative apportionment of convention delegates, since the controlling element is not the legislative act but the approval and ratification of the Act by the people, especially where there is no claim of malapportionment of vote).

269. ILL. CONST. of 1970, art. XIV, § 1(f) (emphasis added).

tion be directed or otherwise limited in the scope of its efforts? These are important questions for Illinois. Should they be resolved affirmatively, it might increase the possibility of constitutional change by allowing for more frequent conventions directed at specific, long-standing controversies. If directed at specific controversies, such as how Illinois judges are to be chosen or how public education should be funded, the fear of potentially unleashing disruption of the political order in a wide-open convention would be eliminated.

Even if the Illinois legislature was not sufficiently unified to draft and propose a new judicial or education article, it could at least submit to the voters the question of whether to call a convention for the purpose of changing the judicial or education articles. The General Assembly would naturally want to be convinced that there was significant public support for considering such reform before authorizing the necessary expenditures. But they would be aided in this by public hearings and other expressions of public opinion. The legislators would be accorded electoral support for having initiated important public debate, as well as for having facilitated any important reforms ultimately approved by the voters; yet without suffering the political consequences of supporting a controversial constitutional measure that may alienate a substantial number of voters.

The state constitution itself places no limitations on the scope of conventions in Illinois. Most conventions, of course, have been used for major revisions;<sup>270</sup> Illinois's six conventions have all proposed entirely revised constitutions to the electorate.<sup>271</sup> Nevertheless, an Illinois convention is free to revise the constitution completely or to only propose amendments to certain portions of the document.<sup>272</sup> While there is still some question as to whether a *federal* constitutional convention could be so limited,<sup>273</sup> a substantial number of all state constitutional conventions have been successfully limited in scope through voter approval of limitations.<sup>274</sup> Moreover, referenda on *limited* convention calls will tend to achieve greater public attention and will result in "higher percentages of approval" than those

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270. See, e.g., Adrian, *supra* note 39, at 322 (noting that when given the option, most state constitutional conventions prefer to write new constitutions).

271. See generally CORNELIUS, *supra* note 114, at 169.

272. ILL. CONST. of 1970, art. XIV, §1.

273. See *infra* notes 276-92 and accompanying text.

274. Francis H. Heller, *Limiting a Constitutional Convention: The State Precedents*, 3 CARDOZO L. REV. 563 (1982).

calling for unlimited bodies.<sup>275</sup> Thus, assuming a clearly limited purpose in the wording of the convention call ballot and in the voter information and publicity, the Illinois General Assembly theoretically could submit a call for a limited, brief, and inexpensive convention to respond to narrow but pressing problems or to consider revising only specific articles.

The question of whether a *federal* constitutional convention could be limited has been discussed often in recent years, as state requests for a convention on various subjects have approached the thirty-four votes necessary to "require" Congress to call a convention.<sup>276</sup> The applications have asked for specific amendments on such issues as legislative reapportionment,<sup>277</sup> balanced budget requirements,<sup>278</sup> and limits on federal income tax increases.<sup>279</sup> Before 1893, the states almost always submitted applications to Congress for general agenda conventions.<sup>280</sup> However, for some reason, the practice has almost totally changed, and since 1929, only one state has applied for a general agenda convention.<sup>281</sup>

275. ALBERT L. STURM, *THIRTY YEARS OF STATE CONSTITUTION-MAKING: 1938-1968*, at 67 (1970) [hereinafter STURM, *THIRTY YEARS*].

276. Bills have been proposed in Congress setting out procedures that Congress must follow when calling and conducting a convention upon general application of the states. See, for example, S. 817, introduced by Senator Orrin Hatch, and S. 600, introduced by Senator Jesse Helms in 1981. A similar bill was proposed by Senator Sam Ervin in 1967. It passed the Senate in 1971, but died in the House Judiciary Committee. Most commentators believe such a law would be helpful in resolving conflicts in advance. See *Article V and the Proposed Federal Constitutional Convention Procedures Bill, Report and Recommendation to the New York State Bar Association by the Committee on Federal Constitution*, 3 CARDOZO L. REV. 529 (1982) [hereinafter *N.Y. Bar Report*]; Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612, 1615-29 (1972). Such "[l]egislation would . . . help avoid the chaos and substantial delay which might result if Congress had to make, on an ad hoc basis following receipt of thirty-four applications, all decisions concerning the sufficiency of applications, the convening of the convention, and the procedures to be followed by it." *Id.* at 1617. As Senator Sam Ervin said in support of his bill: "The Constitution made the amendment process difficult, and properly so. It certainly was not the intention of the original Convention to make it impossible . . . . My bill seeks to preserve the symmetry of article V by implementing the convention alternative so as to make it a practicable but not easy method of constitutional amendment." Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 895 (1968). But cf. Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 193 (1972) (stating that the Ervin bill is unconstitutional, unwise, and could not bind Congress in the future).

277. To overturn the "one-man, one-vote" principle of *Reynolds v. Sims*, 377 U.S. 533 (1964).

278. See Doyle W. Buckwalter, *Constitutional Conventions and State Legislators*, 48 CHI-KENT L. REV. 20, 25 (1971) (noting that Indiana petitioned for a convention on this subject in 1957 and that Wyoming did the same in 1961).

279. *Id.*

280. *N.Y. Bar Report*, *supra* note 276, at 536.

281. *Id.* at 24 (noting that the states had petitioned for a convention on this matter 31 times

Could Congress constitutionally limit a convention to any particular issue submitted by the states? Several scholars support this notion. They view a limited national convention as a sensible and viable means of amending the Constitution. They reason that if only general conventions were permitted under Article V, the convention method for merely amending the Constitution would be reduced to an unworkable absurdity;<sup>282</sup> the magnitude of the required operation and its ultimate effect on our government would make it a very undesirable option. Moreover, the states would have no realistic voice in the convention process unless limited conventions could be held.<sup>283</sup> Of course, there are dangers inherent in any method of amending the United States Constitution. "Thirty-four states representing 30% of the population could call the convention, twenty-six states representing one-sixth of the population could propose new amendments, and thirty-eight states representing less than 40% of the population could ratify them."<sup>284</sup> Nevertheless, compared to the power of the Supreme Court to use the Constitution to make what it considers to be desirable changes in the political and social order,<sup>285</sup> "The power reserved to the people to express their will and judgment by means of the carefully limited amendment process, whether initiated by the representatives in Congress or in the state legislatures, seems modest enough."<sup>286</sup>

There are, however, a number of other scholars who oppose the

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before 1971).

282. See, e.g., William W. Van Alstyne, *The Limited Constitutional Convention — The Recurring Answer*, 1979 DUKE L.J. 985, 994 n.24 (1979) (citation omitted); see also Arthur E. Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 998 (1968) (concluding that "an article V convention may be limited to the same general subject matter as that contained in the state applications" and that a "runaway convention is no real danger since the power of the states and Congress [to limit the scope of the convention] . . . is based on a sound legal and practical basis"); Buckwalter, *supra* note 278 (discussing state legislative attitudes toward the calling of constitutional conventions, including a table of state applications to Congress which lists thirty-four different subjects).

283. See John T. Noonan, Jr., *The Convention Method of Constitutional Amendment — Its Meaning, Usefulness, and Wisdom*, 10 PAC. L.J. 641, 642-44 (1979) (suggesting that states would be "helpless to mandate action by Congress on specific grievances" if they were only allowed to call general conventions); Robert M. Rhodes, *A Limited Federal Constitutional Convention*, 26 U. FLA. L. REV. 1, 12-13 (1973) (explaining that state legislatures may petition Congress to convene a convention, but Congress may "define and restrict" it through the convention call since Congress is obliged to "limit the scope" to the matter of the state's application).

284. Paul G. Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903, 914 (1968) [hereinafter Kauper, *Amendment Process*] (quoting Theodore Sorenson, *The Quiet Campaign to Rewrite the Constitution*, SAT. REV., July 15, 1967, at 17, 19).

285. *Id.* at 917-18.

286. *Id.* at 919.

idea of a limited, or for that matter, *any* federal constitutional convention. A few believe that although the states have been able to limit state conventions, those were limitations ratified through a popular vote. This precedent may not apply to a federal constitutional convention because there is no federal analogue to popular ratification by state citizens.<sup>287</sup> It has also been suggested that state applications setting out the exact text of an amendment as the sole purpose of a convention are really not applications for a "Convention for proposing Amendments" as described in article V and are therefore invalid.<sup>288</sup> At least one commentator has concluded that the "course of steady constitutional evolution [through individual amendments separately weighed and considered as codified solutions to separate problems] is the only one practicable for a society of the size and complexity of the United States."<sup>289</sup> Others are convinced that judicial review is our real system for developmental constitutionalism.<sup>290</sup> In particular, many feel that the periodically recurring applications for a convention for the limited purpose of writing a balanced budget amendment are unwise. Professor Laurence Tribe argues that: (1) the Constitution embodies fundamental law and should not be made the instrument of specific social or economic policies; (2) it would be a mistake to take the uncharted course of an Article V Convention while the well-traveled route of amendment by congressional initiative remains open; and (3) an "Article V Convention, . . . would today provoke controversy and debate unparalleled in recent constitutional history."<sup>291</sup> These fears may be

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287. Heller, *supra* note 274, at 577. But see *N.Y. Bar Report*, *supra* note 276, at 537 n.36 (arguing that the "popular vote" may not be a meaningful distinction); see also Levine, *supra* note 256, at 142-50 (suggesting that the state experience does illuminate the question of limiting federal constitutional conventions).

288. See ORFIELD, *supra* note 65, at 45 (noting that the role of state "legislatures is confined to applying for a convention, and any statement of purposes in their petitions would be irrelevant as to the scope of powers of the convention"); Walter E. Dellinger, *Who Controls a Constitutional Convention?* — *A Response*, 1979 DUKE L.J. 999 (1979) (arguing that a convention, not a state legislature, is authorized under Article V to "define the issues" and to "determine the nature and text of any amendments"); *N.Y. Bar Report*, *supra* note 276, at 538 (noting that the point of recent scholarship in opposition to Congress's limitation powers is that amendments to the federal Constitution ought to originate only from a "fully deliberative body of national scope").

289. Ralph M. Carson, *Disadvantages of a Federal Constitutional Convention*, 66 MICH. L.REV. 921, 930 (1968).

290. See, e.g., Robert G. Dixon, Jr., *Article V: The Comatose Article of Our Living Constitution?*, 66 MICH. L. REV. 931, 947 (1968) (arguing that judicial review is a "traditional and valued process" and a "major form of American policy-making"); see also *supra* note 65 and accompanying text.

291. Laurence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Con-*

unjustified, however, because most state applications for a convention to propose a balanced budget amendment contain "delimiting provisions," evidence that the states themselves are suspicious of a runaway convention.<sup>292</sup>

The early scholars of state constitutional amendment and revision did not fully agree as to whether state conventions could be so limited.<sup>293</sup> Judge John Jameson, at least in the 1867 version of his famous treatise, was biased by his revulsion over the wild assertions of sovereignty in the Illinois conventions of 1847 and 1862.<sup>294</sup> Thus, he argued at least implicitly that *legislative* limits on conventions were legitimate because the legislature represents the sovereign people.<sup>295</sup> By 1910, however, Professor Walter Dodd had rejected Jameson's position. He argued that constitutional conventions were independent bodies which could not be subordinated to legislatures.<sup>296</sup> Professor Roger Hoar weighed in by 1917, concluding that while purely legislative limitations might be invalid, limitations ratified at a popular referendum on a legislative measure calling the convention were entirely valid.<sup>297</sup> This last position has gained nearly universal

*vention to Propose a Balanced Budget Amendment*, 10 PAC. L.J. 627, 633 (1979) [hereinafter Tribe, *Balanced Budget*].

292. Maryanne R. Rackoff, Comment, *The Monster Approaching the Capitol: The Effort to Write Economic Policy into the United States Constitution*, 15 AKRON L. REV. 733, 734 (1982); see also Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1 (1979) (noting the hazards due to unanswered and unanswerable questions regarding constitutional conventions); Robert J. Steamer, *The Quest for Perfection: Amending the Constitution*, 55 N.Y. ST. B.J. 28, 29-31 (Feb. 1983) (discussing the need to limit constitutional amendments to fundamental law).

293. Heller, *supra* note 274, at 565-66.

294. *N.Y. Bar Report*, *supra* note 276, at 537; see JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 656-59 (responding to Professor Van Holst's criticisms of the first edition's thesis of legislative sovereignty as "what the German's call *tendenz* scholarship" (written to support a preconceived thesis)).

295. JOHN A. JAMESON, THE CONSTITUTIONAL CONVENTION: ITS HISTORY, POWERS, AND MODES OF PROCEEDING 352, 378-531 (New York, Charles Scribner 1867). But see JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 342-43 (noting that should the entire electorate, as representatives of the sovereign, "publish instructions to a Convention in reference to the measures it should consider or report, . . . the consequent duty of obedience on the part of the delegates could [not] well be denied"); *Id.* at 354-55, 365 (concluding that whether, under any and what circumstances, the legislature may dictate what the convention shall do is a question of some difficulty).

296. DODD, REVISION AND AMENDMENT, *supra* note 15, at 73-80, 92; see also *Franz v. Autry*, 91 P. 193, 202-07 (Okla. 1907) (holding that conventions are vested with powers and duties derived from the people, not the legislature, and thus can have no superior but the people themselves).

297. HOAR, *supra* note 265, at 91, 108, 121-23; Bartley, *supra* note 25, at 33-35; Heller, *supra* note 274, at 565-66; see, e.g., *Pryor v. Lowe*, 523 S.W.2d 199, 202 (Ark. 1975) (holding that a state constitutional convention composed entirely of *appointed* members, convened *without* popu-



acceptance in state courts and legislatures.<sup>298</sup> In several instances, conventions have been compelled to consider some matters but left free to deal with others as they wished.<sup>299</sup> Some conventions, on the other hand, have been successfully prohibited from amending one or more portions of the state constitution but otherwise left free to revise the remainder as they saw fit.<sup>300</sup> The most common and successful conventions have specified that only a certain mandate or certain subjects should be considered.<sup>301</sup>

Nevertheless, several state legislatures, including Illinois's, have been reluctant to call limited conventions for fear that a convention would exceed any limitations in the call and destroy existing political relationships.<sup>302</sup> In Illinois, the fear that a constitutional conven-

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lar approval and limited in subjects it could consider, deprived the people of their inherent political power).

298. *E.g.*, *Gaines v. O'Connell*, 204 S.W.2d 425, 431 (Ky. Ct. App. 1947) (holding limitations on a convention binding since the Kentucky Constitution contained "no inhibition or restriction upon the General Assembly" in the matter); *Snow v. City of Memphis*, 527 S.W.2d 55, 63 (Tenn. 1975) (holding that the effect of adding the phrase "within the limitation of the call" to the 1870 Constitution was to legalize the "political entity known as a limited constitutional convention"); *Cummings v. Beeler*, 223 S.W.2d 913, 921-22 (Tenn. 1949) (holding that submitting the question of calling a convention to a popular vote is valid); *see also Staples v. Gilmer*, 33 S.E.2d 49, 53-54 (Va. 1945) ("The constitutional convention is an agency of the people to formulate or amend and revise a Constitution. [It] does not possess all of the powers of the people but it can exercise only such powers as may be conferred upon it by the people. The people may confer upon it limited powers.").

299. *See*, for example, Alabama's Convention of 1875, which was only required to provide for a public school system. Connecticut's court-ordered Convention of 1965 was only required to consider legislative apportionment (*Butterworth v. Dempsey*, 237 F. Supp. 302, 306 (D. Conn. 1965)), but being without any other restrictions, ultimately rewrote the entire state constitution. *Note*, *Limited Federal Constitutional Conventions: Implications of the State Experience*, 11 HARV. J. LEGIS. 127, 134 n.40 (1973).

300. Some example are: Alabama's Convention of 1875; North Carolina's Conventions of 1835 and 1875; Louisiana's Convention of 1898; Maryland's Convention of 1850; and New Jersey's Convention of 1947 (which was permitted to make changes in any area except the apportionment of the state legislature). *Id.*

301. Some of these successful conventions were California's Convention of 1878; Georgia's Convention of 1833; New Jersey's Convention of 1966 (prohibited from considering any issue except legislative apportionment); New York's Conventions of 1801 and 1867; Pennsylvania's Convention of 1967-68; Rhode Island's 1944, 1951, 1955, and 1958 conventions; Tennessee's 1952, 1960, and 1971 conventions; and Virginia's 1945 and 1956 conventions. STURM, *MODERNIZING CONSTITUTIONS*, *supra* note 157, at 8. For a discussion of how state court challenges to such limitations have failed, *see Foley v. Democratic Parish Comm.*, 70 So. 104, 105 (La. 1915) (holding that prohibiting a convention from changing an "existing law touching a public board and touching elections . . . was operative and binding"). *See also Louisiana v. American Sugar Ref. Co.*, 68 So. 742, 744 (La. 1914) ("[The] power of [the] Legislature to submit proposals to the people for the holding of a convention was not subject to the restrictions applicable to constitutional amendments.").

302. *Bartley*, *supra* note 25, at 33.

tion might act as a sovereign entity — that is, act as if it were immune from legislatively proscribed and voter ratified limitations — derives from Illinois's unique experience with these bodies. At the 1847 Illinois Convention, for example, a delegate proclaimed:

We are . . . the sovereignty of the State. We are what the people of the State would be, if they were congregated here in one mass meeting. We are what Louis XIV said he was, "We are the State." [sic] We can trample the Constitution under our feet as waste paper, and no one can call us to account save the people.<sup>303</sup>

And in the Illinois Convention of 1862, a leading delegate stated, "If the State is sovereign, the Convention is sovereign. If this Convention here does not represent the power of the people, where can you find its representative? If sovereign power does not reside in this body there is no such thing as sovereignty."<sup>304</sup> Actually, there was significant support for the view that conventions are sovereign entities until as late as 1945.<sup>305</sup>

Of course, as Professor A. E. "Dick" Howard pointed out:

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303. 2 HOWARD, COMMENTARIES, *supra* note 268, at 1182; JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 304; Heller, *supra* note 274, at 566.

304. Heller, *supra* note 274, at 566 (citing JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 304).

305. It was said in the New York Convention of 1821 that "the people are here themselves [by] their delegates . . . [and n]o restriction limits our proceedings." JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 303; Heller, *supra* note 274, at 565-66. Just prior to the Pennsylvania Convention of 1837, Judge George M. Dallas expressed the view that, once assembled, the convention would "possess . . . absolute sovereignty . . ." JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 303; Heller, *supra* note 274, at 566; *see also* *Livermore v. Waite*, 36 P. 424, 426 (Cal. 1894) (noting that the sovereignty of the people is represented by the constitutional convention); *Koehler & Lange v. Hill*, 14 N.W. 738, 744 (Iowa 1883) (dictum) ("The powers of a Convention are, of course, unlimited."), *reh'g overruled sub nom. Koehler v. Hill*, 15 N.W. 609 (Iowa 1883); *Carton v. Secretary of State*, 115 N.W. 429, 430 (Mich. 1908) (holding that deliberations past the date set by the legislature did not invalidate a convention's product; the "convention is an independent and sovereign body"); *Sproule v. Fredericks*, 11 So. 472, 474 (Miss. 1892) (holding that the constitutional convention "is the highest legislative body known to free men in a representative government" and "is supreme in its sphere"); *Goodrich v. Moore*, 2 Minn. 49, 53 (1858) (stating that a constitutional convention "is the highest legislative assembly recognized in law" and that the legislature could not prevent the convention from printing its records); *In re Opinion to the Governor*, 178 A. 433, 451 (R.I. 1935) (holding that the General Assembly may call a constitutional convention because it is elected by the people, and the people are sovereign); JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 308 (discussing the Kentucky Convention of 1849 and the Massachusetts Convention of 1853); R. K. Gooch, *The Recent Limited Constitutional Convention in Virginia*, 31 VA. L. REV. 708, 726 (1945) (discussing the agency concept in reference to conventions and concluding that "there can be no legal limitation" upon a constitution-making authority's substantive accomplishment). *But see* Note, *Constitutional Change*, *supra* note 33, at 1012-13 n.70 (characterizing the view that the convention may itself possess sovereignty as an extreme approach and a discredited natural law assertion).

The prevailing view . . . treats a convention as the agent of the people who have called it. Thus, where the people must vote to approve the calling of a convention, . . . the people are seen to have given their implicit approval to limitations on the convention's power contained in the enabling legislation that put the question of calling a convention to the people.<sup>306</sup>

There is, therefore, far greater support at present for the view that a convention only serves to advise the people and can be limited with regard to the advice it is to render by a vote of the people on a legislative measure proposing a limited convention.<sup>307</sup> There is even precedent for the view that individual electors in one county or legislative district can successfully instruct their delegates on how to vote on a given issue at the convention.<sup>308</sup>

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306. 2 HOWARD, COMMENTARIES, *supra* note 268, at 1182-83 ("But are the People, by the mere act of calling a Convention, obliged to confer upon it *all* of their powers? Surely not. Upon what principle, for what reason, or by what analogy, can it be contended that the people cannot constitute a limited, as well as a general, agency . . .").

307. JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 354-55. This view was expressed best by John Randolph in the Virginia Convention of 1829. *Id.* at 306; Heller, *supra* note 274, at 566. See *State ex rel. Fortier v. Capdevielle*, 29 So. 215, 218 (La. 1901) (discussing an act that allowed the people to fix the powers of a convention, and also provided for submission of a convention call question to the people); Opinion of the Justices, 60 Mass. 573, 575 (1833) (stating that if the people called a convention, the delegates "would derive their whole authority and commission from that vote"); Heller, *supra* note 274, at 569 n.37 (citing cases in which there was a constitutional challenge based on the "grounds that the enabling legislation's limits had been transgressed"); Thomas R. White, *Amendment and Revision of State Constitutions*, 100 U. PA. L. REV. 1132, 1140 n.29 (1952) (quoting Judge Black, former U.S. Attorney, who presented the view that the act of calling the convention limited its power). There is also support for the view that by approving a constitution in which they will no longer be able to vote on the calling of a convention, the people still may have delegated to the legislature the power to decide that a convention can be called for a limited purpose. 2 HOWARD, COMMENTARIES, *supra* note 268, at 1183; see also Note, *Constitutional Change*, *supra* note 33, at 1014 n.78 (1968) (citing cases supporting the conclusion that the electorate may delegate to the legislature the power to call limited conventions). Once the people have ratified a convention's efforts, the question of whether the convention was properly limited becomes moot. After the fact, the limitation is rationalized as proper because of the popular vote on the proposed constitution. According to one judge:

The people have the same right to limit the powers of their delegates that they have to bound the power of their representatives. Each are representatives, but only in a different sphere. It is simply evasive to affirm that the legislature cannot limit the right of the people to alter or reform their government. Certainly it cannot. The question is not upon the power of the legislature to restrain the *people*, but upon the right of the people, by the instrumentality of law, to limit their delegates . . . . When a people act through a law the act is theirs, and the fact that they used the legislature as their instrument to confer their powers makes them the superiors and not the legislature.

Woods's Appeal, 75 Pa. 59, 71-72 (1874) (Agnew, C.J.) (dictum). See generally *Wells v. Bain*, 75 Pa. 39, 49 (1874) (suggesting that when the legislature acts to limit a convention, it is effective because the legislators are representatives of the sovereign people).

308. JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 352-55. During the Ohio Convention of 1850, Butler County passed resolutions instructing their delegates on how to vote

In any event, an Illinois convention's proposed revisions or amendments must be placed on a separate ballot.<sup>309</sup> The changes take effect upon receiving the affirmative votes of a simple majority of those voting on the separate revision question.<sup>310</sup> The convention proposals must be published with explanations at least one month prior to the election<sup>311</sup> so that voters can make an informed decision.<sup>312</sup> Informed popular ratification of state constitutional amend-

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on the doctrine of repealability of corporate charters. *Id.* Vance, one of the candidates for delegate in that county, publicly stated that he would not follow the resolutions. He was elected, however, by a wide majority. When the issue arose at the convention, Vance voted contrary to the resolutions. The county electors reiterated their position and asked Vance to resign. Vance resigned rather than appear disobedient, but according to Judge Jameson he could not have been *forced* to resign or conform because it would be like asking advice from a convention after first dictating the advice. *Id.* at 353.

309. ILL. CONST. of 1970, art. XIV, § 1(g). See discussion *infra* notes 408-14 and accompanying text (discussing the Gateway Amendment's separate ballot requirement).

310. ILL. CONST. of 1970, art. XIV, § 1(g). This was considered a significant reform toward easing popular revision. By 1919, Illinois was one of only six states still requiring a "majority of those voting at [an] election" (a super-majority) to adopt the product of a convention. *Bulletin No. 3, supra* note 120, at 191-92. The others were California, Colorado, Missouri, Montana, and Utah. *Id.* The 1950 Gateway Amendment in Illinois provided the "two-thirds on the question" alternative, but this was apparently still too burdensome.

311. ILL. CONST. of 1970, art. XIV, § 1(f). The 1870 Constitution did not require prior publication of convention proposals or explanations of proposals; pre-election publication was only required for amendments proposed by the General Assembly. ILL. CONST. of 1870, art. XIV, § 2 (amended 1970). However, there was a general act relating to "any proposition . . . other than a constitutional amendment" which was voluntarily observed in connection with the convention questions submitted in 1918 and 1934. ILL. REV. STAT. ch. 7 ½, para. 9ff (1965). For the current version of this statute, see 10 ILCS § 30/1 (1992).

312. These published explanations are important. Voters have an implied right to accurate information about the purpose and function of provisions being proposed by the convention. See *Kahalikai v. Doi*, 590 P.2d 543, 552-53 (Haw. 1979) (discussing misinformation in voter information pamphlets as an infringement of fundamental voting rights). Voter explanations which mislead the voters unconstitutionally abridge voting rights and render the passed revision invalid. *E.g.*, *American Nat'l Bank & Trust Co. v. Kusper*, 372 N.E.2d 66 (Ill. 1978), *cert. denied sub nom.* *Robinson v. Kusper*, 439 U.S. 825 (1978). This case involved a suit seeking a declaratory judgment concerning the validity of a statute which exempted from *ad valorem* personal property taxation (for 1975 and subsequent years) all personal property held by a trustee for the exclusive benefit of a natural person. *Kusper*, 372 N.E.2d at 68. However, an amendment to the 1870 Constitution, approved by the voters in November of 1970 (Article IX, § 5(c)), provided that all revenue lost by the eventual abolition of *ad valorem* personal property taxes must concurrently be replaced by statewide taxes affecting only those classes relieved of the burden of paying *ad valorem* taxes. *Id.* The state Supreme Court held that this exemption for trustees from *ad valorem* taxation — which would obviously reduce state revenue — was unconstitutional because the General Assembly failed to concurrently enact the required "replacement tax." *Id.* at 72. Another issue on appeal, though, was whether the informational pamphlet which discussed the amendment and was mailed to voters before the 1970 referendum was false and misleading and thus voided the amendment. *Id.* at 74. The Illinois Supreme Court found that the replacement tax was not void, that the pamphlet adequately explained the intent behind proposed § 5(c), and that there was no infringement of fundamental voting rights because of misleading information. *Id.*

ments is uniquely important<sup>313</sup> and vital to state constitutional interpretation. Where state voters ratify the work of a convention, it is their understanding that guides judicial construction of ambiguous provisions.<sup>314</sup> Convention debates and materials continue to be help-

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There has also been litigation in several jurisdictions regarding the requirement that the *title* of the proposed amendment printed on the ballot not be misleading to voters. *See, e.g.,* Arkansas Women's Political Caucus v. Riviere, 677 S.W.2d 846, 849 (Ark. 1984) (upholding removal of a proposed amendment on the basis that the popular ballot name, "The Unborn Child Amendment," showed partisan coloring and was misleading). *But see* Chaney v. Bryant, 532 S.W.2d 741, 745 (Ark. 1976) (refusing to overturn a popularly approved amendment on the grounds that the ballot title was misleading because there were no specific constitutional or statutory provisions regarding ballot titles and the amendment was amply publicized); *see also* Becker v. Riviere, 604 S.W.2d 555, 557 (Ark. 1980) (denying a petition to enjoin amendment of certification stating that the popular name and ballot title need not be perfect but just "represent an impartial summary of the measure"); Young v. Byrne, 364 A.2d 47, 52 (N.J. 1976) (stating that a ballot does not have to contain the entire text of an amendment, but must only not be misleading); Ohio v. Celebrezze, 426 N.E.2d 493, 495 (Ohio 1981) (suggesting criteria for judging the validity of a ballot); Oregon Initiative Found. v. Paulus, 597 P.2d 827, 828 (Or. 1979) (certifying a proposed ballot because it was "neither insufficient" nor "unfair" even though it was subsequently revised by the Attorney General). Furthermore, in Evans v. Firestone, 457 So. 2d 1351, 1354 (Fla. 1984), a court ruled that a proposed amendment (concerning a malpractice proposition) was defective because it violated the "single subject" rule — a typical state constitutional provision — which protects the public (and the legislature) from voting based on misleading information. *See, e.g.,* ILL. CONST. of 1970, art. IV, § 8(d) ("Bills . . . shall be confined to one subject.").

313. Only two of the constitutions adopted before 1784, those of Massachusetts and New Hampshire, "were formally submitted to a vote of the people." 2 HOWARD, COMMENTARIES, *supra* note 268, at 1185 (citing DODD, REVISION AND AMENDMENT, *supra* note 15, at 62); STURM, MODERNIZING CONSTITUTIONS, *supra* note 157, at 57-58. By the 1870s, about 50 constitutions had been promulgated, mostly during the Revolutionary and Civil War periods, without a vote of the people. Bartley, *supra* note 25, at 35. Nevertheless, only seven documents that became operative between the Civil War and 1982 were not submitted to the electorate; and only three of these became operative after 1900 — two in Louisiana (1913 and 1921) and the 1902 Virginia Constitution. Sturm, *American State Constitutions*, *supra* note 44, at 57; *see also* Taylor v. Commonwealth, 44 S.E. 754, 755 (Va. 1903) (upholding the validity of the state constitution despite its promulgation in defiance of legislative instructions to submit it to a popular vote because "officers administering the government" (the Governor and the legislators) swore allegiance to it and the people had "peacefully" accepted it by voting under its provisions); Bartley, *supra* note 25, at 35 (discussing the holding in *Taylor*). There was another deviation from the norm at the Illinois Convention of 1847, which declared one article of the constitution in force without submitting it to the people. ILL. CONST. of 1848, Sched. § 4 (amended 1970) (adopting Article XI of the 1848 document even though it was not submitted to a vote by the people). A similar action was taken by the Kentucky Convention of 1892. *See* Miller v. Johnson, 18 S.W. 522, 526 (Ky. 1892) (Bennett, J., dissenting). Popular ratification has become a standard feature of modern American constitutions. *See* Bartley, *supra* note 25, at 35-36 (discussing the adoption of constitutions with and without ratification by the people, and concluding that the constitutions of the 20th century have "almost without exception been submitted to the people"). There is, of course, no federal counterpart to the popular vote required today on questions of state constitutional revision or amendment.

314. Client Follow-Up Co. v. Hynes, 390 N.E.2d 847, 853 (Ill. 1979). In *Hynes*, for example, the Supreme Court examined article IX, § 5(c), which states that "[o]n or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and . . . replace all revenue lost . . . as a result of the abolition . . ." ILL. CONST. of 1970, art IX, § 5(c). The court held that the *assessment* of any personal property taxes after January 1, 1979

ful in putting an ambiguous provision's meaning in context, but the initial judicial focus is on the understanding of the voters.<sup>315</sup>

## V.

The commonmost method of federal Constitutional revision has been amendments proposed by the legislature.<sup>316</sup> The convention

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would be unconstitutional, but not the *collection* of 1978 personal property taxes in 1979. *Id.* at 848, 856. This conclusion was based on an examination of unofficial publications informing voters on the meaning of various sections of the constitution. *Id.* at 854. Viewing the provision in light of the conditions at the time and the particular problem the convention sought to address, the voters were held to have apparently understood that 1978 personal property taxes would still be paid. *Id.* at 850. *See also* Utter, *Freedom and Diversity*, *supra* note 39, at 510 (1984) (discussing the differences between statutory and constitutional textual construction and explaining that "the 'common and ordinary meaning' in which the constitution's words must be construed, is the meaning they would have had to the vast majority of ordinary voters, rather than to a group of highly educated lawyers and legislators, as may sometimes be considered when construing statutes").

315. *Hynes*, 390 N.E.2d at 853-54. Extensive reference to the record of proceedings as persuasive authority in construing the 1970 Constitution had become the early rule in Illinois. Levine, *supra* note 14, at 402. It was also the rule prior to 1970. *See* *People ex rel Keenan v. McGuane*, 150 N.E.2d 168, *cert. denied* 358 U.S. 828 (1958). However, on occasion the Illinois Supreme Court has been criticized for relying exclusively on the convention debates. *E.g.*, Stephen A. Seigal, *The Future of Classified Real Property Taxation in Illinois: The Wake of Hoffman v. Clark*, 11 LOYOLA U. CHI. L.J. 21, 68 (1979). Today, Illinois practice is largely in conformity with that of most states: all state courts must ascertain and carry out the intent of the voters in adopting specific provisions. *E.g.*, *Baumbaugh v. San Diego County*, 113 P.2d 218, 220-21 (Cal. Dist. Ct. App. 1941) (examining information provided to voters prior to election and the instructions on the ballot); *School Dist. of Pontiac v. City of Pontiac*, 247 N.W. 474, 477 (Mich. 1933) (examining voter intent in construing an amendment). This is accomplished by looking at circumstances leading to the provision's adoption and the purpose sought to be accomplished. Seigal, *supra*, at 68. Thus, while arguments to the voters in support of or against a constitutional amendment may be examined to aid in construction of doubtful language, such contemporaneously published arguments are not controlling. *E.g.*, *California Inst. of Tech. v. Johnson*, 132 P.2d 61, 63 (Cal. Dist. Ct. App. 1942); *McGuire v. Wentworth*, 7 P.2d 729, 734 (Cal. Dist. Ct. App. 1932). Instead, courts generally look to the debates of a convention and to the history of the times. *Union Steam Pump Sales Co. v. Deland*, 185 N.W. 353, 355 (Mich. 1921); *see also* *People ex rel. Bay City v. State Treasurer*, 23 Mich. 499, 506 (1871) (examining and construing constitutional provisions by consulting the "public history of the times").

316. All twenty-seven amendments to the United States Constitution have been proposed by Congress. For a discussion of the history behind the adoption of the first twenty-five amendments, *see* Weclaw, *supra* note 65, at 174-87. Amendments are occasionally passed to rectify what Congress believes to be erroneous constitutional interpretation. The Eleventh Amendment, for example, was the direct result of the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) which, with one dissent, held that a citizen of one state had the right to sue another state in federal court. Ratified in 1798, the Eleventh Amendment forbade such suits, and in *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court interpreted the Eleventh Amendment to also prohibit suits by a citizen against his own state. The federal courts, however, have tended to narrowly construe both the Eleventh Amendment and the *Hans* decision, and have increasingly narrowed the scope of sovereign immunity. This was accomplished by: (1) determining suits against the state from suits against an individual public officer; (2) developing distinctions between requests for prospective as compared to retroactive relief; and (3) distinguishing between

was extensively used in the states at first, but it was too cumbersome for small changes. The states soon adopted the process of legislative initiation of amendments in addition to, or as a substitute for, conventions.<sup>317</sup> The two methods of constitutional amendment were introduced in the United States at about the same time. The general use of amendment by legislative action originated in the South,<sup>318</sup> where this method actually preceded amendment by convention.<sup>319</sup> While six states allow *complete* revision by the legislature,<sup>320</sup> a majority of states require a convention to substantially revise their constitutions.<sup>321</sup> Distinctions between the action required to legislate as compared to proposing a constitutional amendment have always existed.<sup>322</sup> Legislative proposals to amend a constitution are not considered an ordinary legislative function, and they are not ordinarily subject to constitutional provisions regulating the introduction and passage of ordinary legislative enactments.<sup>323</sup>

The Illinois legislature was severely handicapped in its ability to

who bears the burden of satisfying judgments against the state. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 176-77 (2d ed. 1988) [hereinafter *TRIBE, CONSTITUTIONAL LAW*].

Three other federal constitutional amendments also sought to overturn Supreme Court interpretations of the U.S. Constitution: Section 1 of the Fourteenth Amendment overruled certain aspects of *Scott v. Sandford*, 60 U.S. (19 Haw.) 393 (1856); the Sixteenth Amendment overturned *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); and the Twenty-sixth Amendment overturned *Oregon v. Mitchell*, 400 U.S. 112 (1970). There are always large numbers of proposed constitutional amendments pending in Congress at any given time. In March 1984, for example, pending proposals ranged from topics such as school prayer, abortion, and a balanced budget (thirty-four proposed amendments dealing with this subject were before the House of Representatives) to such matters as establishing English as the nation's official language and abolishing congressional immunity for traffic citations received on trips to and from the Capitol. Francis J. Flaherty, *The Amend Corner: 175 Attempts to Change the Constitution*, *NAT'L L.J.* Mar. 26, 1984, at 3, 8. Other proposals would create radical changes. For example, one proposal sought to abolish all personal income, and estate and gift taxes. *Id.* Few of the 175 proposed amendments pending in 1984 were ever expected to proceed much further. *Id.*

317. DODD, *REVISION AND AMENDMENT*, *supra* note 15, at 120.

318. This practice originated in the constitutions of Delaware (1776), Maryland (1776), and South Carolina (1778). *Id.* at 120-27.

319. *Id.*

320. CAL. CONST. art. XVIII, §§ 1, 4 (1879); FLA. CONST. art. XI, §§ 1, 5 (1968); GA. CONST. art. X, § 1 (1976); HAW. CONST. art. XVII, §§ 1, 3 (1978); N.C. CONST. art. XIII, § 4 (1970); OR. CONST. art. XVII, § 2 (1859).

321. Colantuono, *Comment*, *supra* note 16, at 1479. The weight of authority is that where a constitution specifically provides two means of alteration, reading the language of the legislative amendment provision with that of the convention provision will often imply that a complete revision by the legislature is prohibited. DODD, *REVISION AND AMENDMENT*, *supra* note 15, at 261; JAMESON, *CONSTITUTIONAL CONVENTIONS*, *supra* note 14, at 573-74.

322. JAMESON, *CONSTITUTIONAL CONVENTIONS*, *supra* note 14, at 573-74.

323. *See, e.g., Collier v. Gray*, 157 So. 40, 44 (1934) (upholding an amendment even though the procedural rules applicable to ordinary legislative enactment were violated).

propose and effectuate constitutional change under the 1870 Constitution.<sup>324</sup> This was due to several factors. The legislature could amend no more than one article per session and could not amend the same article more than once every four years<sup>325</sup> — problems largely ameliorated by the 1970 Constitution.<sup>326</sup> Also, under the 1870 Constitution, the approval of two-thirds of the members elected to each house was necessary to place an amendment before the voters.<sup>327</sup> The 1970 Constitution ameliorated this problem somewhat by reducing the necessary majority to three-fifths of the members elected to each house.<sup>328</sup> Potential amendments may now be initiated in either house but must be read in full on three different days in each house (the “third reading rule”)<sup>329</sup> and must be reproduced before the final vote is taken.<sup>330</sup> After approval by three-fifths of the members, amendments are submitted to the voters at the next general election occurring at least six months after legislative approval.<sup>331</sup> Amendments may be withdrawn before they are submitted to the voters by a vote of a simple majority of the members

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324. The difficulties with the process of legislative initiation of constitutional measures originated, as did the method itself, in the 1848 Illinois Constitution. *See, e.g., infra* notes 428-36 and accompanying text (discussing the “number and frequency” provisions).

325. ILL. CONST. of 1870, art. XIV, § 2 (amended 1970).

326. *Id.* The present provision disallows legislative submission of “proposed amendments to more than three Articles of the Constitution at any one election.” *Id.*; ILL. CONST. of 1970, art. XIV, § 2(c).

327. ILL. CONST. of 1870, art. XIV, § 2 (amended 1970).

328. ILL. CONST. of 1970, art. XIV, § 2(a). In 1915, Illinois was one of only *seventeen* states whose constitutions required that amendments be submitted by a two-thirds vote of the membership of each house; nineteen states required only a majority vote and seven mandated a three-fifths vote. DEALEY, *supra* note 15, at 141. The Committee on Suffrage and Constitutional Amendment at the 1970 Convention decided to propose a reduction in the necessary legislative majority, from two-thirds to three-fifths, after testing the proposed new majority against previous vote counts on legislatively-proposed amendments (and convention calls). GRATCH & UBIK, *supra* note 168, at 28. Since 1870, only 16 of 39 constitutional propositions that have been presented have passed. But if the standard for passage had been “those voting on the issue,” 21 measures would have passed a two-thirds requirement, 29 would have passed a three-fifths majority, and 35 of 39 would have passed a simple majority. *Id.* The Committee’s proposal thus seemed to significantly reform the amendment process. *Id.* However, the Committee continued the comparatively restrictive super-majority requirement necessary to avoid ill-considered change by a momentary majority. *Id.*

329. The Committee on Suffrage and Amendment at the 1970 Convention developed this requirement as one of several safeguards to insure that the General Assembly acted responsibly. *Id.* at 30. This was one of the procedures designed “to slow down the legislative process, provide an opportunity for re-consideration, and give the public time to review and respond” to proposed measures. *Id.* Other similarly conceived requirements were the “withdrawal,” “prompt submission to the public,” and “publication period” provisions. *Id.*

330. ILL. CONST. of 1970, art. XIV, § 2(b).

331. *Id.* § 2(a).



elected to each house.<sup>332</sup> The proposals must be published with explanations at least one month prior to the election.<sup>333</sup>

The worst impediment to revision in the 1870 document, however, was that a proposed amendment had to be approved by a majority of those *voting in the election*, not just those voting on the amendment.<sup>334</sup> Time and again, this requirement made it difficult for an amendment to gain voter approval.<sup>335</sup> Significantly, there was no

332. *Id.*

333. *Id.* § 2(b). Where a constitution contains specific provisions regarding the publication of proposed amendments, there must be substantial compliance with these provisions for amendments to be validly adopted. DODD, REVISION AND AMENDMENT, *supra* note 15, at 159-60. Compare *State ex rel. Woods v. Tooker*, 37 P. 840, 844 (Mont. 1894) (holding that publication three months prior to election when constitutions required publication two weeks prior to election to be insufficient and thus amendments ratified by popular vote were invalid) with *State ex rel. Thompson v. Winnett*, 110 N.W. 113, [pp] (Neb. 1907) (holding publication which was one week short of the required three months to be sufficient for purposes of statutory compliance) and *Commonwealth ex rel. Att'y Gen. v. Griest*, 46 A. 505, 511 (Pa. 1900) (stating that "strict compliance with a time limit is not essential"); see also *State ex rel. Morgan v. O'Brien*, 60 S.E.2d 722 (W. Va. 1948). In *O'Brien*, publication was required "at least three months before the election," but inadvertently publication occurred only two months before the vote. Nevertheless, this was held to be substantial compliance, and submission of the proposed amendment to the electorate was held to be valid since it was not shown that the voters were misled or defrauded by the delay. *Id.*

334. This is an impediment to which Illinois clings even though it is insupportable today. See, e.g., GRATCH & UBIK, *SUPRA* note 168, at 27 (noting that the Committee on Suffrage and Constitutional Amendment at the 1970 Illinois Convention was in "total agreement" that the provision made no sense and was probably unconstitutional). This sort of ratification requirement enjoys little popular or political support nationally. By 1919, in all but Illinois and eleven other states, if an amendment received a majority of the votes cast upon the question it was deemed adopted. *Bulletin No. 3*, *supra* note 120, at 183-84. What made Illinois's inflexibility even more severe than those states with the same super-majority requirement was that, of the other eleven states, only Tennessee, Indiana, and Illinois had other restrictions in addition to a super-majority voting requirement. DODD, REVISION AND AMENDMENT, *supra* note 15, at 133-34; *Bulletin No. 3*, *supra* note 120, at 184; Kopp, *supra* note 235, at 487; Comment, *Constitutional Revision — Constitutional Amendment Process*, 9 NAT. RESOURCES J. 422, 427-28 (1979).

335. Of the thirty-seven proposals submitted between 1870 and 1970, only three were defeated by the negative vote of a majority of those voting on the proposal while nineteen were defeated because they failed to receive a "majority of those voting in the election." Bergstrom, *supra* note 121, at 469 (comparing Illinois's amendment efforts to those of various other states). Thus, this sort of requirement acted as a serious impediment to amendment, arguably one far more burdensome than can be justified by any need to protect abstract minorities, to act with "caution" in fundamental matters, or to discourage trivial proposals. See, e.g., DODD, REVISION AND AMENDMENT, *supra* note 15, at 274-79 (suggesting that requiring a high threshold of votes for passage of an amendment tends to discourage, illuminate, or defeat trivial or unimportant amendment proposals). This has long been clear from the experience in other states as well. For example, in Minnesota, a state with experience in popular approval of amendments by both super-majority and ordinary majority requirements, the pattern is clear. From 1858 to 1898, when adoption was measured by a majority of those voting on the proposition, 48 out of 66 proposed amendments (72 percent) were adopted. But from 1898 to 1946, when the more rigid rule was in place, only 26 out of 80 proposed amendments (32.5 percent) were adopted. FRANK P. GRAD, LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIV., THE DRAFTING OF STATE CONSTITUTIONS: WORKING

problem between 1870 and 1891: the first five proposed amendments to the 1870 Constitution were all adopted.<sup>336</sup> But this success was largely attributable to the "party circle" voting system that was used between 1848 and 1891. Each political party printed its own ballot which included the amendment and the party's decision to vote for or against the amendment.<sup>337</sup> Voters who openly declared their political affiliation and then used the party ballot were automatically counted as having voted on any amendment in accordance with the party's position by marking the "party circle."<sup>338</sup> Under such a system, a majority of those voting in the election would most likely also be a majority voting on the amendment.

However, in 1891, the so-called "Australian" ballot system came into use.<sup>339</sup> Spaces were provided at the bottom of a now publicly-printed ballot for voters to mark "yes" or "no" on amendments. The prospects for constitutional revision changed drastically once this system was adopted.<sup>340</sup> Moreover, after 1899, amendments were

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PAPERS FOR A MANUAL Ch. III, 22-23 (1967). (National Municipal League 1967). It would be putting the cart before the horse to suggest that the latter low rate of passage after 1898 was attributable to the vast increase in "trivial" proposals.

336. BRADEN & COHN, *supra* note 262, at 566; CORNELIUS, *supra* note 114, at 80, 89-90; Bergstrom, *supra* note 133, at 469.

337. The form of ballot employed in Illinois during different periods has had a pronounced influence on the results of the popular vote for amendments. *Bulletin No. 3*, *supra* note 120, at 177. Before 1848, the Illinois Constitution permitted *viva voce* voting. *Id.* When the voter approached the polls, he was asked to name his choice of candidates and to vote "yes" or "no" on any pending measure as well. Since it was easier to vote than to refuse to answer, the vote on the question of calling a convention in 1824 was almost equal to the total vote cast for candidates at the same election. *Id.* When the printed ballot came into use in 1848, the printing of ballots fell upon political parties, which largely printed ballots either in favor of or opposed to the measure. *Id.* at 177-78. Thus straight party votes included the recommended action on the amendment printed on the ballot. Most important, since "party circle" ballots made it possible for voters to cast substantially the same number of votes on a measure as that cast for candidates, the framers of the 1870 Constitution would have had little anticipation of the difficulty to be caused after 1891 by the unintended but de facto "super-majority" voting requirement that emerged. In fact, between 1891 and 1899, when proposed amendments were printed at the bottom of the new *official* ("Australian") ballot with blank spaces for "yes" or "no", less than 25 percent of those voting expressed any opinion on measures. *Id.* Even though it hardly solved the problem of inflexibility, at least when separate ballots came into use after 1899, the number of votes on measures immediately doubled. *Id.* By 1910, proposed amendments had to be on separate ballots in at least seven states. DODD, REVISION AND AMENDMENT, *supra* note 15, at 184, 279 (noting that it was thought that this would focus more attention on these proposals).

338. *Bulletin No. 3*, *supra* note 120, at 177.

339. ILL. REV. STAT. ch. 46, § 303 (1891) (creating the "Australian" ballot and providing for public printing of ballots with spaces at bottom to mark "yes" or "no" on constitutional measures).

340. See *supra* note 337 (discussing the affect of changing the form of the ballot on the chance of Constitutional revision). Between 1892 and 1896, for example, three amendments were submit-

placed on separate ballots which were separately counted.<sup>341</sup> Consequently, amendments could be more easily ignored, and since a majority of those voting in the election was still required for passage, failure to vote on the separate ballot in effect became a "no" vote.<sup>342</sup> The amendment itself could receive a majority of votes from those voting on it yet still be defeated if persons who voted on other matters abstained from voting on the new separate ballot.<sup>343</sup> In essence, maintaining the original innocuous language (written long before

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ted — the first so-called "Gateway" amendment to liberalize the amending process (1892), a labor law amendment (1894), and the 1896 "Gateway" amendment — but all were soundly defeated because approximately 79 percent of the voters failed to mark their ballots on the amendment question. CORNELIUS, *supra* note 114, at 90; Bergstrom, *supra* note 121, at 469. See generally Legislative Reference Bureau, *Bulletin No. 2: The Initiative, Referendum and Recall*, in ILLINOIS CONSTITUTIONAL BULLETINS 65 (1920) [hereinafter *Bulletin No. 2*] (outlining and analyzing the initiative, referendum, and judicial decisions as applied to state and local issues). One commentator has suggested that the so-called "reform" of the Australian ballot actually contributed to the national decline in levels of participation in elections.

The presidential election of 1896 — that was the year it all began to go wrong. First there was the Australian Ballot. Of a sudden, the citizen was deprived of his duty to declare his choice in public before his peers. Henceforth we would skulk into the polls, vote in secret and slip away uncounted and unappreciated. The object [of the publicly-printed Australian ballot], of course, was to stop the "machines" from turning out the "ignorant" vote, but curiously voter turnout generally began to fall off. In earlier years, we recorded ourselves in high numbers in presidential elections (82 percent in 1876), but we have been declining ever since. Last time out we barely cleared the 50 percent mark.

Daniel P. Moynihan, *Our Succession Crisis: Why More Reform Means Less Democracy*, NEWSWEEK, Feb. 1, 1988, at 27.

341. *Bulletin No. 3*, *supra* note 120, at 178.

342. There is, of course, some authority for the proposition that it is *unreasonable* to treat inaction on an amendment as a vote against the amendment. *E.g.*, *Green v. State Bd. of Canvassers*, 47 P. 259 (Idaho 1896); Kopp, *supra* note 235, at 487. By 1968 only eleven states still required a majority voting at the election for ratification of a proposed amendment regardless of the actual vote on the measure itself. Kopp, *supra*, note 235, at 487. For a more recent comparison of various state requirements, see Arthur O. Beach, Comment, *Constitutional Revision — Constitutional Amendment Process*, 9 NAT. RESOURCES J. 422, 427-28 (1979).

343. Substantial numbers of those going to the polls have always abstained from voting on amendments or convention calls. During the period from 1892 to 1896, nearly 79 percent of those voting in each Illinois election failed to vote on constitutional amendments (3 proposed, none ratified). CORNELIUS, *supra* note 114, at 90; Bergstrom, *supra* note 133, at 469; *Bulletin No. 2*, *supra* note 340, at 73. From 1899 to 1929, when constitutional amendments were printed on a separate ballot, non-voting diminished between 25 percent to 40 percent (6 amendments proposed, 3 ratified). From 1929 to 1949, Illinois constitutional amendments were simply printed on the left side of the general ballot, yet more than half of those voting in the elections still failed to vote on the constitutional provisions (none of the seven amendments proposed during this period were adopted). Kopp, *supra* note 235, at 487. This general experience with the effects of ballot procedures on voting patterns for amendments is also true in other states. See generally Note, *Super-majority Voting Requirements: Possible Constitutional Objections*, 55 IOWA L. REV. 674 (1970) [hereinafter Note, *Super-majority Requirements*] (reviewing super-majority requirements in general).

modern balloting systems) in the face of voter apathy had the effect of creating a "super-majority" requirement.<sup>344</sup> The constitutional inflexibility ultimately caused by this originally unforeseen problem was *compounded* early in the twentieth century when the Illinois Supreme Court ruled, in 1917,<sup>345</sup> that adoption of a proposed amendment required a vote equivalent to a majority of *all electors voting at an election* in which members of the General Assembly are elected, not just a majority of the votes cast at that election for members of the General Assembly. (Apparently, many voters at general elections would not vote for members of the General Assembly but only other officials of more local interest.) What is distressing about this distinctly conservative act of constitutional interpretation is that not only did the Illinois Supreme Court decline an opportunity to ease the process of constitutional change, but in so declining it chose to side with a small minority of jurisdictions.<sup>346</sup>

The *Stevenson* court failed to take proper account of legislative history indicating that the "plain meaning" of this provision in 1870 manifested an intent different from the *effect* caused by that language today.<sup>347</sup> The more flexible "majority on the question" interpretation has long been the majority view.<sup>348</sup> Given Illinois's history of *excessive* constitutional rigidity, this would also be the better view should the issue arise again. The *Stevenson* interpretation had the effect of making one of the most rigid and unworkable constitutions<sup>349</sup> even more "unamendable" than necessary.<sup>350</sup> Further, the

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344. There are generally two types of super-majorities: (1) those requiring a stated percentage, usually three-fifths or two-thirds of those voting on the issue; or (2) those requiring a simple majority of the highest total vote cast in the general election in which the issue is submitted. Note, *Super-majority Requirements*, *supra* note 343, at 674.

345. *People v. Stevenson*, 117 N.E. 747, 749 (Ill. 1917). See also *State ex rel. Witt v. State Canvassing Bd.*, 437 P.2d 143, 147 (N.M. 1968) (discussing how super-majority requirements foil efforts at amendment and violate the Equal Protection Clause); *State ex rel. Cope v. Foraker*, 23 N.E. 491 (Ohio 1890) (striking down an amendment which received a majority of the votes from those actually voting on it, but less than a majority of those voting at the election).

346. See *infra* note 358 and accompanying text (explaining that Illinois is in the minority). This decision seems to imply a recognition by the court that the political environment in Illinois at the time required a conservative ruling to increase the required super-majority in order to maintain stability. This was a decision which compounded, rather than ameliorated, what had already been a condition of constitutional inflexibility.

347. See *supra* notes 229-34, 334-44 and accompanying text (discussing how the "majority of those voting in the election" requirement impeded revision of the Illinois Constitution).

348. See *supra* note 334.

349. See *Sears & Laughlin*, *supra* note 119, at 439 (describing various state provisions for constitutional revision and concluding that Illinois "is in the worst position of any state in the Union" owing to its rigid and restrictive amendment provisions).

350. See *State ex rel Witt v. State Canvassing Bd.*, 437 P.2d 143, 152 (N.M. 1968) ("[W]e

court did this even though the *de facto* dilution of votes for change in virtually every area of constitutional choice which ultimately resulted from the language in the original provision was neither foreseen nor intended.<sup>351</sup>

There are, of course, virtues to super-majority requirements. These include the protection of political minorities,<sup>352</sup> the safeguard of a stable constitutional framework, the protection of private rights, and the avoidance of hasty, ill-advised decisions.<sup>353</sup> Nevertheless, even though super-majority requirements of the sort found in Illinois have been characterized as denials of equal protection or "rule by the minority,"<sup>354</sup> but they have yet to be successfully challenged. Such schemes have also been questioned under Article IV, Section 4 of the federal Constitution, which guarantees each state a republican form of government.<sup>355</sup> The schemes are especially questionable because abstentions count, in effect, as votes against the measure when, as a general parliamentary practice, those who abstain are usually deemed to acquiesce.<sup>356</sup> For example, in *New Mexico ex rel. Witt v. State Canvassing Board*,<sup>357</sup> the New Mexico high court reasoned:

[It is] thus quite evident that to hold that three-fourths of those voting at any given election is required to amend [the state constitution] would give

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should not lose sight of the fact that to construe 'electors voting in the whole state' to in effect mean 'all electors voting at the election' as distinguished from those voting on the particular amendment, would have the effect of making the 'unamendable section' even more unamendable . . . .").

351. *Id.* (citing *State ex rel. Ward v. Romero*, 125 P. 617, 621 (N.M. 1912)) ("Where the spirit and intent of the instrument can be clearly ascertained, effect should be given to it, the strict letter should not control if the letter leads incongruous results, clearly not intended.").

352. This purpose was made evident in the framing of the United States Constitution, which requires a two-thirds majority in Congress to propose amendments, a two-thirds majority of the states to call a Constitutional Convention, and a majority of three-fourths of the states to ratify an amendment to the Constitution. U.S. CONST. art. V. The framers feared that an "unfettered majority could irrationally and irresponsibly suppress a sizeable minority . . . [so they] attempted to protect the minority by requiring a greater proportion of the populace to be convinced of the wisdom of the proposed action before allowing its enactment." Note, *Super-majority Requirements*, *supra* note 343, at 676.

353. *Id.* at 677-78. The idea is to "requir[e] a greater proportion of the populace to [become] convinced of the wisdom of the proposed action before allowing its enactment." *Id.* at 676.

354. *Id.* at 676.

355. *Id.* at 685-92.

356. J. B. Glen, Annotation, *Basis for Computing Majority Essential to the Adoption of a Constitutional or Other Special Proposition Submitted to Voters*, 131 A.L.R. 1382 (1941) (supporting the conclusion that unless a Constitution or law declares or clearly implies the contrary, qualified electors who do not present themselves to vote, or who do not vote on a proposition, are presumed to assent to the will of those who actually cast their ballots).

357. 437 P.2d 143 (N.M. 1968).

effect as having cast negative votes to those voters who at the election because of negligence, lack of interest, or some other unexplained reason failed to register their votes on the particular proposition. No logical reason for counting as opposed those who do not express their preference has been suggested.<sup>358</sup>

Accordingly, given "the dilution of voting strength possible under the scheme and the fact that it is inconsistent with the principle that those who speak should decide, it appears such state schemes [including Illinois's] would . . . be an unconstitutional denial of equal protection."<sup>359</sup>

Nor is it by any means clear that super-majorities (especially "majority of those voting in the election" super-majorities) for state constitutional amendment are lawful merely because explicit super-majorities are required by many states for the purposes of limiting indebtedness, raising taxes, funding education, or modifying the bill of rights.<sup>360</sup> These matters are traditionally and commonly restricted in this way because of their extreme importance and the compelling state interest in maintaining economic and social stability and fiscal

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358. *Id.* at 153; see also *Harris v. Walker*, 74 So. 40, 41 (Ala. 1917) (holding that "the qualified voters who voted at said election upon the proposed amendments" means a majority of those voting on that particular amendment); *Tinkel v. Griffin*, 68 P. 859, 861 (Mont. 1902) (holding that a majority of electors voting "clearly means a majority of those who vote" on an issue, and not a majority of all electors voting); *Davy v. McNeill*, 240 P. 482, 490 (N.M. 1925) ("Ordinarily, the vote of voters who do not choose to participate in an election are not to be taken into consideration in declaring the result."); *King v. City of McAlester*, 273 P.2d 139, 141 (Okla. 1954) (upholding a vote where the "question received a majority of the votes cast upon the proposition," although the number of votes failed to constitute a majority of the total amount of members present to vote at the election); *Wilson v. Wasco County*, 163 P. 317, 319 (Or. 1917) (holding that the "majority of those electors who actually vote upon a measure is controlling and is in accord with general spirit" that the "will of the majority as expressed at the polls is supposed to govern"); *Ladd v. Yett*, 273 S.W. 1006, 1012 (Tex. Civ. App. 1925) (holding that "each proposed amendment should be by the voters considered separately, and the result as to each is to be determined from the votes cast for or against it, irrespective of the total number of votes that may be cast at an election submitting several and distinct amendments to a city charter"). But see *Green v. State Board of Canvassers*, 47 P. 259, 261 (Idaho 1896) (holding that inaction is a vote against an amendment); *People v. Stevenson*, 117 N.E. 747, 751 (Ill. 1917) (requiring that a majority of the electors voting at an election is "a majority of the votes of all the electors voting at an election . . . and not . . . a majority of the votes cast"); *State ex rel. Stevenson v. Babcock*, 22 N.W. 372, 375 (Neb. 1885) (concluding that the convention framing the constitution obviously "presumed that if an amendment was necessary and really desired by the people, a majority would favor its adoption"); *State ex rel. Cope v. Foraker*, 23 N.E. 491, 491-92 (Ohio 1890) (stating that the requirement of "a majority of the electors voting at such election" plainly indicates but one construction, a "majority of all the electors voting at such election . . ."). These latter cases represent the minority view.

359. See Note, *Super-majority Requirements*, *supra* note 343, at 689.

360. *Gordon v. Lance*, 403 U.S. 1, 6 (1971).

integrity.<sup>361</sup>

The West Virginia Constitution, for example, requires the approval of 60 percent of the voters before political subdivisions can incur bonded indebtedness or exceed constitutional tax rates.<sup>362</sup> When a county school bond proposal was defeated because it received only slightly more than 50 percent of the vote, the proponents sued, challenging the constitutionality of the requirement.<sup>363</sup> The West Virginia Supreme Court found that the 60 percent requirement violated the federal Equal Protection Clause because "the votes of those who favored the issuance of the bonds had a proportionately smaller impact on the outcome of the election than the votes of those who opposed issuance of the bonds."<sup>364</sup> The United States Supreme Court reversed, in an opinion by Chief Justice Warren Burger,<sup>365</sup> because the West Virginia court's reliance on federal voting rights cases was "misplaced".<sup>366</sup>

Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue. . . . The constitutions of many States prohibit or severely limit the power of the legislature *to levy new taxes or to create or increase bonded indebtedness*, thereby insulating entire areas from majority control. . . . [S]o long as *such provisions* do not discriminate against or authorize discrimination against any identifiable class they do not violate the [federal] Equal Protection Clause. . . . [W]e do not decide whether a State may, consistently with the Constitution, require extraordinary majorities for the election of public officers.<sup>367</sup>

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361. *Id.*

362. W. VA. CONST. art. 10, § 8.

363. The litigation ultimately resulted in the opinion in *Gordon v. Lance*, 403 U.S. 1 (1971).

364. *Id.* at 4.

365. *Id.* at 2-3.

366. *Id.* at 4.

367. *Id.* at 6-7, 8 n.6 (emphasis added); see also *Westbrook v. Mihaly*, 471 P.2d 487, 511 (Cal. 1970) (en banc) (noting that extraordinary majorities may be required in areas of compelling state interest even though no evidence of such an interest was found with regard to the *bond issue* question before the court); *Bogert v. Kinzer*, 465 P.2d 639, 640 (Idaho 1970) (upholding a two-thirds majority requirement on a bond issue). Unfortunately, precisely because the case deals with the traditionally vital state interest in fiscal responsibility, these remarks about super-majority requirements for *any and all constitutional change* are far more similar to those that might be required for a similar fundamental exercise of popular sovereignty — the election of public officials. Super majorities in these situations are dissimilar to those required for the narrow number of "entire areas" traditionally immunized from simple majority action to serve compelling state interests (like financial solvency). Thus, by declaring that it was not deciding "whether a state . . . may require extraordinary majorities for the election of public officials," *Lance*, 430 U.S. at 8 n.6, the Court has impliedly avoided the issue of super majorities for amendment as well.

In *Lockport v. Citizens for Community Action*, the Court sustained a concurrent majority requirement for referenda on new county charters.<sup>368</sup> Under New York law, a county charter had to be approved by two separate majorities in the county — the urban voters and the rural voters.<sup>369</sup> In rejecting a “one person-one vote” attack on that scheme, Justice Potter Stewart’s opinion emphasized that “[t]he equal protection principles applicable in gauging the fairness of an election involving the choice of legislative representatives are of limited relevance, however, in analyzing the propriety of recognizing distinctive voter interests in a ‘single-shot’ referendum.”<sup>370</sup> “[The] differing interests of city and non-city voters in the adoption of a new county charter” were sufficient to justify the scheme.<sup>371</sup> The *Lockport* decision, then, says that the state may reasonably take into account the unique interests of the discrete, isolated, and historically less numerous rural voters. Otherwise, vital minority interests in local government would be ignored in the majoritarian political process. The urban vote may be diluted with regard to the common issue of revision of county government, but this can be justified by the compelling nature of the sovereign interest served — protecting the unique interests of the rural “class” from the majoritarian abuses in the modern era.<sup>372</sup> *Lance*<sup>373</sup> was also reasonable in sustaining the explicit super-majorities required in many states for certain specific issues such as taxes, debt, education, or individual rights. These highly crucial and sensitive areas of governance cannot be left susceptible to erratic and serious interference from the majoritarian political process. Voters for change in these areas have traditionally had their votes diluted or limited by state constitutions because of the state’s important interest in preserving social stability and fiscal integrity.<sup>374</sup>

Nevertheless, these decisions do not justify a practice of requiring super-majorities for the election of political officials or for general state constitutional revision. Rather than merely being referenda to

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368. 430 U.S. 259, 272-73 (1977).

369. *Id.* at 261-62.

370. *Id.* at 266.

371. *Id.* at 271-72. “The ultimate question then is whether, given the differing interests of city and noncity voters in the adoption of a new county charter in New York, those differences are sufficient under the Equal Protection Clause to justify the classifications made by New York law.” *Id.* at 271.

372. *Id.* at 271-73.

373. *Gordon v. Lance*, 403 U.S. 1 (1971).

374. *Id.* at 6.



ensure sufficient support for policy changes sought by the (already representative and accountable) legislature in sensitive aspects of government, representative elections and state constitutional amendatory measures involve the most fundamental acts of direct popular sovereignty. There are few individual liberties more important in a republican democracy than the right of the sovereign to revise or amend the fundamental charter of government. Consequently, there is:

No rational basis to distinguish between voting for representatives [and] voting on constitutional amendments. One is no more a necessary ingredient of our democratic process than the other. Nor can it be said that an equal voice in selection of the legislature is of greater importance to a citizen than equality of weight in expression of views on our charter.<sup>375</sup>

Therefore, even though there has been no definitive characterization of the interests at stake from the Supreme Court, it would seem that elections over state constitutional amendment or revision are quite similar to choosing legislative representatives and that both interests should be given similar protection. Significant restraints on the fundamental right of self-governance such as super-majority requirements — traditionally permissible only with regard to a narrow number of highly crucial issues (in order to protect against political instability or lack of fiscal integrity) — are not appropriate for voter ratification of every constitutional change proposed by the legislature. Super-majorities further devalue the *already* generally diminished vote for fundamental constitutional change.<sup>376</sup>

The Illinois Supreme Court, anticipating *Lance*<sup>377</sup> and *Lockport*,<sup>378</sup> also approved an explicit state constitutional super-majority requirement for voter approval of increases in state indebtedness by the legislature. *In re Natural Resources Development Bond Act*<sup>379</sup> concerned a failed 1968 referendum on a bond issue. The issue had received the votes of a majority of those voting on the measure, but the "yes" votes did not constitute a majority of the number of votes cast at the election for members of the General Assembly,<sup>380</sup> the super-majority expressly required for increasing debt under the

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375. State *ex rel.* Witt v. State Canvassing Bd., 437 P.2d 143, 150-51 (N.M. 1968).

376. See, e.g., *supra* notes 145-46, 228 and accompanying text (discussing the natural bias in favor of the status quo).

377. *Gordon v. Lance*, 403 U.S. 1 (1971).

378. *Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977).

379. 264 N.E.2d 129 (Ill. 1970).

380. *Id.* at 130.

1870 Illinois Constitution.<sup>381</sup> The Illinois court concluded that, based on federal law: (1) votes may not be debased in selecting a representative; (2) voters may not be excluded from other decision-making elections absent a "rational basis"; and (3) there were no "cases [indicating] that the Supreme court would impose a strict 'one man-one vote' rule on the approval of bonded indebtedness."<sup>382</sup> The court held that states may constitutionally require a showing of popular consent greater than a simple majority in elections other than selecting a representative where "an issue is of such importance to require it. . . . [or if the super-majority requirement bears] a rational relationship to a legitimate state purpose."<sup>383</sup>

The court cited the 1870 Constitutional Convention debates for the view that the intent was to "place certain restrictions upon the General Assembly relative to the appropriation of State funds because there was a strong skepticism about unlimited state indebtedness."<sup>384</sup> But what is not discussed in *Natural Resources* is that while this objective might justify requiring a legislative super-majority to incur indebtedness, or perhaps a state-wide referendum to check legislative action, it would not necessarily make reasonable a super-majority requirement for *voter* ratification of the debt legislation.<sup>385</sup> As for the reasonableness of demanding ratification by a majority of those voting at the election for "members of the General Assembly," the Court's reasoning is somewhat obscure:

[It] is the General Assembly that has the responsibility to appropriate funds from the bond issue as the need arises. *It is reasonable that the Convention determined there should be a tie-in between the vote on the referendum and the election of the members of the General Assembly who have the duty to appropriate the sums so approved.* We believe that limitation of indebtedness is a legitimate State purpose and that the reference to the General Assembly vote bears a rational relationship to this purpose.<sup>386</sup>

It is not clear that the Convention "determined" any such thing, even if this "tie-in" *were* rational. The court also appeared to misconstrue the way in which votes for "change" are diluted under "majority in the election" super-majority schemes.<sup>387</sup> Citing none of

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381. ILL. CONST. of 1870, art. XIV, § 18 (amended 1970).

382. *In re Natural Resources*, 264 N.E.2d at 132.

383. *Id.* at 132-33.

384. *Id.* at 133.

385. *Id.*

386. *Id.* (emphasis added).

387. See *supra* notes 228-29 and accompanying text (discussing "negative minorities").

the reasoning or authority that may have been available at the time on this question,<sup>388</sup> the court dismissed the claim of infringement of fundamental voting rights by irrationally concluding that:

[We] can perceive of no inequality of voting power as between different individuals. Each individual *has the right to cast one vote* for a State legislator and for the bond issue. No question of debasement or dilution is present because *all voters are in an identical position upon entering the voting booth*.<sup>389</sup>

Fortunately, however, the members of the 1970 Constitutional Convention did not miss the point. Apparently satisfied that a new "three-fifths" legislative majority requirement would provide adequate protection against unreasonable and excessive debt, the 1970 Constitution removed the "majority voting in the election for General Assembly" provision for voter approval.<sup>390</sup> A majority of those voting on the question is now an alternative to the legislative super-majority vote as a means of incurring indebtedness.<sup>391</sup> Consequently, since *Natural Resources* was effectively overruled by the 1970 Constitution, that decision contains no view of law or legislative history that would support sustaining an even more restrictive super-majority requirement for voter ratification of all legislatively-proposed constitutional amendments.

Super-majority ratification requirements for *all* state constitutional amendments would not originally have been placed in the 1870 Constitution in furtherance of any important minority or state interests.<sup>392</sup> These interests, as with caution over indebtedness, were

388. *E.g.*, *Westbrook v. Mihaly*, 471 P.2d 487, 495-500 (Cal. 1970).

389. *In re Natural Resources*, 264 N.E.2d at 134. (emphasis added). *But see, e.g.*, *Westbrook*, 471 P.2d at 498 (stating that it is not necessary that those who are disadvantaged constitute an objectively identifiable class prior to the election because such a class can be "defined by the act of voting affirmatively on a bond issue"); *see also Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (holding that restrictive election laws requiring new political parties seeking a ballot position to first obtain petitions totaling 15 percent of the last election, as opposed to the 10 percent requirement imposed on established parties, was invidiously discriminatory and violative of the Equal Protection Clause); *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (holding that a state can impose reasonable residence requirements for voting but it cannot deny the ballot to a bona fide resident merely because he is a member of the armed services); *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting) (noting that a voting right is more than the right to mark a piece of paper; it includes the "right to have the ballot counted. . . [a]t full value without dilution or discount").

390. ILL. CONST. of 1970, art. IX, § 9(b). It should be remembered that the usual voter approval requirement for an amendment is either a three-fifths majority of those voting on the question or a majority of those voting in the last election for members of the General Assembly. Thus, an approval of an indebtedness question is *easier* than approval of a non-indebtedness question.

391. *Id.*

392. There is always the argument, of course, that the intent of the framers in 1870 is irrele-

already protected by the super-majority requirement intentionally imposed for legislative passage of proposed amendments to be later submitted for voter ratification. Super-majorities for voter ratification of all amendments seem a superfluous and unconstitutional impediment to the fundamental right to exercise sovereignty.<sup>393</sup> Finally, it is inconceivable that the people would have provided for a super-majority for voter approval of legislative amendments when they provided for simple voter majorities for the approval of entire constitutions.<sup>394</sup> Thus, the constitutionality of a super-majority requirement for voter approval of legislatively-proposed constitutional measures in Illinois is in serious doubt.

On several occasions, the people of Illinois have attempted to remedy the harshness of the "majority voting in the election" requirement for ratifying amendments. The Gateway Amendment,

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vant. After all, the 1917 *Stevenson* decision was subsequently *ratified* by the people, who then added an *explicit* super-majority requirement through the Gateway Amendment in 1950 (a two-thirds voting majority) and finally "liberalized" the requirement in the 1970 convention (to a three-fifths voting majority). However, the purpose for the proposal and ratification of these super-majority requirements was a compromise specifically seeking to lessen the extreme rigidity caused by the implicit super-majority requirement for voter approval of amendments unforeseen in 1870, but in existence since 1899 and sustained in *Stevenson* in 1917. It was certainly not because there was a consensus that had identified a need to ameliorate a past experience with trivial, reckless, or abusively majoritarian revision efforts. In fact, the constitutionality of the more liberal super-majority requirement in the 1970 Constitution arose as an issue in the Committee on Suffrage and Constitutional Amendment even before the full convention debate on the proposal. GRATCH & UBIK. *supra* note 168, at 28-30. The committee staff counsel's research focused primarily on whether this super-majority as applied to voter action violated the Fourteenth Amendment, but he found no law to support that proposition. *Id.* Subsequent to the convention, the Illinois Supreme Court decided *In re Natural Resources Dev. Bond Act*, 264 N.E.2d 129 (Ill. 1970), where it upheld Article IV, § 18 — which required ratification of bond indebtedness by "a majority of the votes cast for the members of the General Assembly at such elections" — under the U.S. Constitution. This seemed to confirm the correctness of the Committee's decision to recommend the continued use of a super-majority requirement, albeit one that was easier to meet. However, the *Natural Resources* court supported "the constitutionality of extraordinary majorities in situations exhibiting a compelling state interest" and stated that if "bond issue questions exhibit [such] a sufficient interest, it follows that a three-fifths standard for constitutional revisions would be permissible." GRATCH & UBIK. *supra* note 168, at 29 n.20.

It may not "follow" that such a majority is constitutional for votes on questions of constitutional amendment or who should be elected to public office. Super-majorities for bond issues are a tradition, and they are narrowly tailored to accomplish the important state interest of fiscal integrity with regard to state financial or economic matters. Explicit super-majorities for *all* revision, on the other hand, have no clear historic tradition and serve no important purpose. This is especially so given the existence of a *legislative* super-majority to guarantee calm deliberation and adequate support for fundamental change. Voter super-majority requirements deny equal protection of the fundamental individual right of suffrage where the weight of a vote *against* change is far heavier than the vote *for* change. See also *supra* notes 354-59 and accompanying text.

393. See *supra* text accompanying note 376.

394. ILL. CONST. of 1870, art. XIV, § 1 (amended 1970).

passed by the voters in 1950,<sup>395</sup> allowed approval of an amendment by a majority of those voting in the election or by two-thirds of those voting on the amendment itself.<sup>396</sup> This facilitated the passage of amendments to some extent. Only three amendments were approved during the fifty-nine year period between 1891 and 1950.<sup>397</sup> Between 1952 and 1966 alone, however, fifteen amendments were submitted and six were approved; but only two of the six were approved with the help of the Gateway Amendment.<sup>398</sup> Under Gateway, a continuing "political veto" was still held by each of what were fairly equally divided "one-thirds" of the state population with distinct and different economic and political views: Chicago, "the suburbs," and "downstate."<sup>399</sup> Consequently, the potential for revision generated by Gateway was still inadequate.

The 1970 Illinois Constitutional Convention modified this super-majority provision again so as to allow approval of amendments by either a majority of those voting in the election or by "three-fifths" of those voting on the amendment.<sup>400</sup> Between 1970 and the present, only nine amendments were proposed by the legislature, and five of these failed to pass.<sup>401</sup> Only four relatively unimportant, uncontroversial "legislative" provisions prevailed: an amendment to reduce the time allowed for the redemption of certain kinds of property to be sold for nonpayment of taxes (approved by voters in

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395. CORNELIUS, *supra* note 114, at 123-26.

396. BRADEN & COHN, *supra* note 262, at 565.

397. See generally GOVE & KITSOS, *supra* note 211, at 6-11 (1974) (discussing constitutional revisions proposed from 1848 to 1966).

398. *Id.* at 10-11; BRADEN & COHN, *supra* note 262 at 568; GOVE & KITSOS, *supra* note 211, at 10-11; see also GRATCH & UBIK, *supra* note 168, at 17 (noting that the Gateway Amendment did not produce the hoped-for liberalization).

399. For a discussion of the inadequacies of the post-"Gateway" revision process between 1952 and 1966, and for a perceptive analysis of electoral behavior which "added scholarly weight to the arguments" urging a call for the Sixth Constitutional Convention in 1968, see THOMAS KITSOS, CONSTITUTIONAL AMENDMENTS AND THE VOTER, 1952-1966, COMMISSION PAPERS OF THE INSTITUTE FOR GOVERNMENT AND PUBLIC AFFAIRS (1968) (cited in CORNELIUS, *supra* note 114, at 136-37); GRATCH & UBIK, *supra* note 168, at 17.

400. ILL. CONST. of 1970, art. XIV, § 2(b). The Suffrage and Constitutional Amendment Committee's original proposal was for a simple three-fifths vote on the question. The convention, however, acting as a committee of the whole, added the old "majority voting in the election test," in order make clear to the public that a liberalization of the process as compared to 1870 was intended. GRATCH & UBIK, *supra* note 168, at 47.

401. The five that failed passage were: (1) an amendment which would have limited the Governor's amendatory veto to changes in matters of form and correction of technical errors, (2) an amendment eliminating the requirement of abolition of all remaining personal property tax, and (3) three separate proposed amendments which would have allowed the General Assembly to give veteran's organizations a property tax exemption.

1980),<sup>402</sup> two amendments to expand the category of suspects who may be denied bail (approval by voters in 1982 and 1986),<sup>403</sup> and the victims Bill of Rights Amendment (approved in 1992).<sup>404</sup>

In sum, the Illinois Constitution of 1970 has been the second least amended of the 50 state documents currently in force.<sup>405</sup> This is not unimportant; there are a number of problems with such inflexibility. First, legislatures will tend to be reluctant to propose to voters amendments concerning important reforms or changes in basic governmental structure or policies unless it is clear that they will be noncontroversial enough to garner the super-majority required. Second, the super-majority provides the legislature with the alternative possibility of submitting amendments to the people only when the legislature wants to have ratified its own inaction on difficult questions, like judicial reform or educational financing.<sup>406</sup> The failure of an amendment to attract the required super-majority of voters becomes a post hoc rationalization for legislative inaction. Third, of course, is the resulting discouragement of judicial independence in matters of constitutional interpretation caused by the near impossibility of reform in judicial selection methods and the lack of a vehicle for expression of popular acceptance or rejection of expansive interpretation.<sup>407</sup>

The 1970 Constitution retained another problematic requirement first imposed as a "reform" by the 1950 Gateway Amendment: amendment questions had to be placed before the voters on a separate ballot.<sup>408</sup> The separate ballot requirement was intended to pro-

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402. S.J. Res. 56, 81st Gen. Assembly, 1980 Ill. Sess.

403. S.J. Res. 36, 82d Gen. Assembly, 1982 Ill. Sess.; S.J. Res. 22, 84th Gen. Assembly, 1986 Ill. Sess.

404. ILL. CONST. of 1970, art. I, § 8.1 (adopted Nov. 3, 1992).

405. May, *supra* note 11, at 162 (indicating that Illinois's constitution was the least amended of any of the state documents at the time of publication). At present, only Indiana's constitution has been amended fewer times. By 1969, Illinois had made only fourteen changes in the one hundred years since the 1870 constitution; New York, on the other hand, had made 168 amendments to a document only 74 years old at the time. CORNWELL ET AL., *POLITICS OF REVISION*, *supra* note 23, at 4.

406. See *supra* note 32 and accompanying text (discussing the "education" amendment).

407. See *supra* discussion at notes 39-45.

408. The Illinois Constitution requires "separate ballots" for referendum questions on: (1) whether to call a convention, ILL. CONST. of 1970, art. XIV, § 1(c); (2) whether to approve revisions or amendments proposed by a constitutional convention, *Id.* § 1(g); and (3) whether to approve amendments proposed by the General Assembly, *Id.* § 2(b). Voting machines or other electronic or mechanical systems cannot be used since general provisions calling for the use of such machines must give way to the specific provision for the separate "Blue Ballot." See 10 ILCS § 5/16-6 (1993). Proposed amendments were on separate ballots in at least seven states as early

mote increased voter interest and participation on constitutional issues,<sup>409</sup> even though this goal is not always reflected in judicial interpretation of this provision.<sup>410</sup> It is not clear that the separate ballot has met drafters' expectations. For example, when the Gateway Amendment itself finally passed it passed on a separate blue ballot, but primarily because the election was preceded by a well-organized political and educational campaign.<sup>411</sup> The importance of such campaigns cannot be over-emphasized.<sup>412</sup> Without such a concerted campaign, Gateway's provision for separate ballots for revision probably would not *itself* have passed even though it was on a separate ballot. Ironically, the failure of this so-called "reform" — calculated to ease constitutional change — would have left Illinois with at least the possibility of reinstating the obsolescent but, in retrospect, more efficacious party circle ballot system for constitutional

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as 1910. DODD, REVISION AND AMENDMENT, *supra* note 15, at 184, 279.

409. The colored separate ballot was intended to increase voter awareness of the proposition and stimulate voter participation. *Id.*; CORNELIUS, *supra* note 114, at 123-26, 143. Actually, it was colored pink in Minnesota, the state from which Illinois borrowed the idea, but undesirable connotations caused the Illinois legislature to change the ballot color to blue. CORNELIUS, *supra* note 114, at 123-26, 143. Since 1952 the "Blue Ballot," even when unidentified with specific issues, has been considered a symbol of reformist government in Illinois. As a matter of convention, therefore, a vote for the "Blue Ballot" is considered a vote for government reform. *Id.*

410. Although separate ballots were intended to help promote greater voter participation, this goal is not often reflected in judicial *construction* of the statutory or constitutional election provisions that pertain to separate ballots. This is no doubt due to the use of the "plain meaning rule" in those few cases that have arisen regarding such ballots. For example, when "nonpartisan" ballots are required, separate paper ballots must be used. Consequently, amendment questions may not be placed on voting machines where they would be more likely to gain public attention. *People ex rel. Barrett v. Barrett*, 201 N.E.2d 849, 851 (Ill. 1964). Also, a statute directing that a voter mark his ballot on constitutional amendments with a "cross" was held to require the voiding of ballots marked either with a "check" or the word "yes." *See Scribner v. Sachs*, 164 N.E.2d 481, 490 (Ill. 1960) (holding that the legislature has the power to provide by law the usual, ordinary, or necessary details required for the holding of an election). The legislature, not the court, was thought to be the appropriate body to revise this statute, if necessary, to permit alternative markings. *Id.* at 491; *see also State ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566-67 (Fla. 1980) (holding that the legislature has the duty to legislate to ensure ballot integrity and a valid election process).

411. The General Assembly revised the election laws to allow the proposition to be submitted to the voters on a separate blue ballot. 10 ILCS § 5/16-6 (1993). At each polling place, every voter was to be handed a blue ballot, informed of its purpose, and instructed to return it to the election judge regardless of whether the ballot was marked or not. CORNELIUS, *supra* note 114, at 97. The idea of giving specific "notice," emphasizing the importance of voting on an amendment, was modeled after a similar device used in Minnesota, whose constitution also requires a majority of those voting in the election for approval of an amendment. MINN. CONST. art. IX, §1. For a discussion of the campaign for the passage of the Gateway Amendment, *see* CORNELIUS, *supra* note 114, at 95-98.

412. CORNELIUS, *supra* note 114, at 123-26.

revision.<sup>413</sup> Adoption of the Gateway Amendment, however, prohibited a return to the party circle ballot.<sup>414</sup>

Once an amendment is approved by the required number of voters and is adopted by the proper canvassing authorities,<sup>415</sup> it becomes an operative part of the Illinois Constitution. The reasonable implications from adopted amendments are also incorporated directly into the constitution.<sup>416</sup> For instance, the adoption of a constitutional amendment empowering the legislature to establish a local government has been held sufficient to authorize the legislature to

413. The Illinois legislature sought to revive "party circle" ballots in the 1946 Gateway Amendment, but the bills that would have accomplished this, Senate Bills 514 and 516, were vetoed by then-Governor Green. Kenneth C. Sears, *Constitutional Revision and Party Circle Bills*, 14 U. CHIC. L. REV. 200, 214 (1947). Under this plan, the constitutional amendment would have appeared separately on the ballot. If a voter marked the party circle, she was counted as voting the party's position on the proposition unless she "scratched" by voting specifically on the proposition as it appeared on the left side of the ballot. *Id.* at 210. Bills of this kind were introduced in Illinois initially in 1935. *Id.* at 213. As early as 1897, New Jersey had employed a similar ballot. In 1898, in response to the 1875 Alabama Constitution's "majority of those who vote in the election" requirement, the Alabama legislature submitted a proposal providing that ballots should have "for amendment" printed on it and that one would have to strike it to vote against the amendment. *Bulletin No. 3*, *supra* note 120, at 194. The amendment carried and was held constitutional. *May v. Mayor and Alderman of Birmingham*, 26 So. 537, 539 (Ala. 1899). But with the adoption of the new Alabama constitution in 1901, such a scheme became impossible. *Bulletin No. 3*, *supra* note 120, at 194. From 1901 to 1912, Nebraska and Ohio at various times successfully tried essentially the same "party circle" ballot that was originally used in Illinois. *Id.* at 194-95. Professor Howard has intimated that "party circle" ballots might invite challenge as "palpably deceptive or misleading," citing as an example what came to be known as the "trick" ballot, which was used when Virginia citizens voted on calling the convention of 1901-02. 2 HOWARD, COMMENTARIES, *supra* note 268, at 1174. It had the words "For Constitutional Convention" printed on it; to vote against the convention, one had to scratch out the words. Unmarked ballots were therefore counted as votes for the convention. *Id.* But as was the case in Alabama, the use of the somewhat related forms of "party circle" ballots in Ohio and Nebraska were both upheld. *State ex rel. Thompson v. Winnett*, 110 N.W. 1113, 1118 (Neb. 1907); *Ohio ex rel. Sheets v. Laylin*, 68 N.E. 574, 575 (Ohio 1903).

414. Kopp, *supra* note 235, at 487.

415. Unless a Constitution provides otherwise, an amendment does not become effective until the vote has been canvassed and the result announced. *E.g.*, *People ex rel. Lynch v. Board of Supervisors*, 100 Ill. 495, 501 (Ill. 1881); *In re Joslyn's Estate*, 75 N.W. 930; *State v. Kyle*, 65 S.W. 763, 767 (Mo. 1901); *Real v. The People*, 42 N.Y. 270, 276 (1870); *see also* DODD, REVISION AND AMENDMENT, *supra* note 15, at 204 (suggesting that "[u]nless a constitution specifically provides otherwise, the better rule . . . [is] that an amendment does not become effective in any case until the vote has been canvassed and the result announced"); JAMESON, CONSTITUTIONAL CONVENTIONS, *supra* note 14, at 543-45 (noting that where an amendment has been submitted to the people, states generally require that the vote then be canvassed and subsequently announced to the people, although states may differ as to which "mode of announcing the result" they adopt). *But see* Schall v. Bowman, 62 Ill. 321, 322 (1870) (holding that an amendment becomes a part of the organic law upon adoption by the people).

416. *See People ex rel. Soble v. Gill*, 193 N.E. 192, 194 (Ill. 1934) (holding that there is a presumption that an act ratified by the people is valid).



also delegate authority to that new local government to legislate on local matters.<sup>417</sup> The legislature, in other words, would then be able to engage in what was previously an unconstitutional procedure for the enactment of laws — delegating legislative authority to local governments.

One last impediment to amendment by legislative initiative imposed by the 1870 Illinois Constitution was that amendments could be proposed to only one article of the constitution at the same session, and to the same article only once every four years.<sup>418</sup> This was

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417. *Id.* at 195. In *Soble*, the Illinois Supreme Court upheld a statute delegating to the City Council of Chicago the authority, otherwise held by the state legislature, to fix municipal court fees. *Id.* There was agreement that this previously unconstitutional delegation of legislative power was now within the purview of a constitutional amendment empowering the legislature to establish local municipal government in Chicago. *Id.* at 194. The General Assembly, it was held, could lawfully delegate to that local government the obviously necessary and proper concurrent power, among others, to set fees for local municipal services. *Id.* at 196. This authority was *impliedly* given to the legislature by the constitutional amendment. If the legislature could now constitutionally create a local government, it seems clear that it should also be able to grant to that city or village the necessary power to *legislate* with reference to specific matters that are purely local to that locality, like fees for city services. *Id.* See also *People ex rel. City of Canton v. Crouch*, 403 N.E.2d 242, 250 (Ill. 1980) (holding that a municipality may execute the objective of the General Assembly, but it must stay within bounds of the act); *North Maine Fire Protection Dist. v. Village of Niles*, 365 N.E.2d 733, 737 (Ill. App. Ct. 1977) (holding that the power to determine municipal boundaries, granted to judges under a statute was a proper delegation of power). Other jurisdictions have also upheld as constitutional the delegation of state legislative powers to municipalities and municipal officers. See, e.g., *Bushnell v. Sapp*, 571 P.2d 1100, 1103 (Colo. 1977) (noting that giving a city the option to bring police cars within no-fault coverage did not constitute an unconstitutional delegation of legislative power); *Thompson v. Municipal Elec. Auth. of Georgia*, 231 S.E.2d 720, 724-725 (Ga. 1976) (providing that amounts to be paid to a municipal electric authority pledged by political subdivisions were general obligations and did not constitute unconstitutional delegations of power to a municipality or the taking of property without due process); *Collis v. City of Bloomington*, 246 N.W.2d 19, 26 (Minn. 1976) (holding that a municipality's requirement that, as a condition for approval of a subdivision, a dedication of a portion of subdivision property for parks and playgrounds or contribution of cash to be used for such purposes was not an unconstitutional delegation of power to the municipality); *In re Egg Harbor Assoc.*, 464 A.2d 1115, 1119 (N.J. 1983) (holding that "in its discretion, the Legislature may delegate this [state's police power] to municipalities or to state agencies"); *DePetrillo v. Coffey*, 376 A.2d 317, 319 (R.I. 1977) ("[T]he General Assembly may delegate to municipal corporations . . . all powers . . . which are incidental to municipal government and of purely local concern."); *Redevelopment Agency of San Pablo v. Shepard*, 75 Cal. 3d 453, 459 (Cal. Ct. App. 1977) (finding that delegating legislative authority to an administrative agency is not unconstitutional and noting that "the validity of any particular exercise of such powers can be determined in the light of the purpose and intent of the legislation considered in the context of the market-place conditions to which the agency's action relates"). But cf. *New Milford v. SCA Servs. of Conn.*, 384 A.2d 337, 340 (Conn. 1977) (holding that legislative power was unconstitutionally delegated since there were no adequate standards for controlling the action of local officials in granting or denying permits); *Indiana Univ. v. Hartwell*, 367 N.E.2d 1090, 1094 (Ind. Ct. App. 1977) (holding that legislative power was improperly delegated since it gave uncontrolled discretion).

418. ILL. CONST. of 1870, art. 14, § 2 (amended 1970). There was a prohibition in the 1848 Constitution against the legislature proposing amendments to more than one article at a time, but

one of the most conservative and inflexible provisions in the country at that time<sup>419</sup> and obviously limited the extent of possible reform.<sup>420</sup> When speaking of the 1848 Constitution at the 1870 Constitutional convention, Delegate John Dement said:

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there was no requirement for a four-year waiting period between changes to the same article (the 1818 Constitution did not even provide for legislatively-proposed amendments).

419. The 1870 Convention proposed a "one article every four years" limitation notwithstanding the fact that no other constitution in the United States had such a limitation. These extremely conservative restrictions were much debated at both the 1848 and the 1870 conventions. Illinois Supreme Court Justice and 1847 Convention delegate Walter B. Scates opposed giving the legislature this power to propose amendments to the constitution altogether, as "they would never let it alone, but at every session would be tinkering at it." CORNELIUS, *supra* note 114, at 41 (citing COLE, *supra* note 100, at 200). But others doubted that this procedure would be used very often — especially given the sizeable majorities needed at each step of the process and the "one article at a time" restriction. *Id.* Several respected delegates in 1870 argued that the legislature and the people certainly could be trusted to carefully decide changes to two articles generated by one session, but the attempt to allow two amendments at the same session failed by a vote of 24 to 21. *Id.* at 62. Compared to changes made in the amending procedures in other states during the 1840s and 1850s, Illinois's 1848 provisions were already especially rigid. *Id.* Now, without more than a debate over the speculative aspects of human nature to support it, this peculiar rigidity not only continued unabated but was reinforced in the 1870 Constitution. By 1919, Illinois was one of *only twelve states* with restrictions on the number, frequency, or character of amendment proposals. *Bulletin No. 3*, *supra* note 120, at 183 (the others were: Arkansas, Colorado, Indiana, Kansas, Kentucky, Montana, New Jersey, New Mexico, Pennsylvania, Tennessee, and Vermont); *see also* DODD, REVISION AND AMENDMENT, *supra* note 15, at 132-33 (describing the various restrictions on amendment proposals and concluding that five states, including Illinois, "are so strict as to prevent the ready adaption" of any proposal). Illinois was also one of *only eight states* to limit the number of amendments to be submitted at one time. DEALEY, *supra* note 15, at 141.

420. Except to the extent that it was held that an amendment which explicitly changes one article can still, by implication, constitutionally amend other articles. *People ex rel. Engle v. Kerner*, 205 N.E.2d 33, 37 (Ill. 1965); *see also* *City of Chicago v. Reeves*, 77 N.E. 237, 238 (Ill. 1906) (noting that the limitation on amending more than one article was intended to "prohibit the proposal of express amendments to more than one article . . . at the same session, and was not intended to prevent implied amendments"); *People ex rel. Soble v. Gill*, 193 N.E. 192, 194 (1934) (establishing a city municipal court is germane to the plan contemplated by the amendment authorizing the establishment of a local city government); *see also* *People ex rel. Elder v. Sours*, 74 P.2d 167 (1903) (stating that a "no more than six articles" provision would be within the bounds of the state constitution). Thus, one amendment containing several propositions may also be considered just "one" amendment. One judge has noted that:

If the different changes contained in the proposed amendment all cover matters necessary to be dealt with in some manner, in order that the Constitution, as amended, shall constitute a consistent and workable whole on the general topic embraced in that part which is amended, and if, logically speaking, they should stand or fall as a whole, then there is but one amendment submitted. But, if any one of the propositions, although not directly contradicting the others, does not refer to such matter, or if it is not such that the voter supporting it would reasonably be expected to support the principle of the others, then there are in reality two or more amendments to be submitted . . . .

*Kerby v. Luhra*, 36 P.2d 549, 554 (Ariz. 1934). Finally, an "amend only one article at the same session" limitation can be evaded by proposing additional amendments at *special* sessions. 1912 Ill. Att'y Gen. 1102.

[The] persons whose attention was directed to abuses in the judiciary department of the State, would not propose an amendment unless to that article. Others who viewed the objections to the executive or the legislative articles as more serious, insisted that those were the articles that should first be amended — or one of those articles; and the consequence was the General Assembly could not unite a majority of two-thirds in favor of any one amendment.<sup>421</sup>

Yet this situation persisted under the 1870 Constitution. The objective of that Convention was to avoid creating false super-majorities for proposals based on "log rolling," which would have resulted if it was possible to amend different articles at the same session. However, an equally serious danger resulted after 1870 — deadlocks and intransigence by the advocates of competing proposals prevented any change at all.<sup>422</sup>

The 1950 Gateway Amendment, in a significant improvement,<sup>423</sup> allowed the General Assembly to propose amendments to "three Articles of the Constitution at any one election."<sup>424</sup> Implied revisions to other articles — which might in effect raise the total number of articles amended to more than three — would also be constitutional under the new less-restrictive provision.<sup>425</sup> The 1970 Constitution retained this "three article" restriction.<sup>426</sup> The change in Gateway has not, however, accounted for any expanded constitutional growth since 1950.

There continue to be no restrictions imposed as to the subject

421. 2 DEBATES, *supra* note 197, at 1315.

422. *Id.*; *Bulletin No. 3*, *supra* note 120, at 175.

423. *See* Kopp, *supra* note 235, at 487.

424. ILL. CONST. of 1970, art. XIV, § 2(c).

425. *People ex rel. Engle v. Kerner*, 205 N.E.2d 33, 37 (Ill. 1965). In *Engle*, the prohibition against the proposal by any one General Assembly of amendments to more than three articles was held not to be violated when an increase in the number of legislators caused by one 1954 amendment to the *legislative* article, necessarily and impliedly also amended the article on *revision* by simultaneously increasing the number of legislators required to call a constitutional convention and the number of delegates at such a convention under that article. *Id.* Other states also allow implied changes to articles of the state constitution not explicitly amended. *See, e.g.*, *Brosnahan v. Brown*, 651 P.2d 274, 286-87 (Cal. 1982) (validating a proposition to add a "Victims' Bill of Rights" even though it amended or repealed, by implication, various statutory provisions not specified in the text of the provision); *People ex rel. Elders v. Sours*, 74 P. 167, 178 (Colo. 1903) (upholding a provision that limited or modified other articles in the state constitution since a limitation on the legislature (amending one article at a time) deals with the proposal of express amendments, not amendments by "necessary implication"); *Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337, 341 (Fla. 1978) (concluding that once the constitutional restraint is perceived as "functional as opposed to locational, substantial effect by the proposal upon any other section or article of the Constitution becomes irrelevant").

426. ILL. CONST. of 1970, art. XIV, § 2(c).

matter of amendments.<sup>427</sup> The only other limitation on legislative amendatory measures is that no amendment shall be proposed by the General Assembly between the time a convention is called and the time the electors vote on any revision or amendments proposed by the convention.<sup>428</sup> The purpose of this provision is to prevent the legal confusion which could result from the proposal of such an amendment if, at the same time, the convention submitted an amendment which conflicted with or varied from the proposed amendment. In addition to the legal confusion over which amendment would actually be in effect, an amendment proposed by the legislature during this time could also lead to voter confusion.<sup>429</sup> Indeed, this kind of legislative interference occurred during the 1970 convention.<sup>430</sup> While the convention was meeting and its Revenue and Finance Committee was debating a proposal on the same issue, the General Assembly began consideration of a proposed amendment to the 1870 Constitution that called for abolishing the personal property tax as it applied to individuals.<sup>431</sup> Before the convention could finish its work, which included a provision phasing out *ad*

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427. There are no "subject matter" restrictions on amending the Federal Constitution either, except that "no State . . . shall be deprived of its equal Suffrage in the Senate." U.S. CONST. art. V. This limitation is "permanent and unalterable." *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 348 (1856). It has been suggested that the Senate's equal state suffrage provision should be interpreted as a broad guarantee that state powers will never be absorbed by the federal government. See, e.g., William L. Marbury, *The Limitations Upon the Amending Power*, 33 HARV. L. REV. 223, 229 (1919) (noting that there is "one express limitation placed upon the amending power in article V" that no amendment shall take away any function which is essential to essence of a state and legislative power must be "deemed one of those functions"). It has also been suggested that there might be implicit, enforceable limits based on the Constitution's principal goal of protecting human dignity — such as the exclusion of a potential amendment creating a racial hierarchy. E.g., Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 745, 754-57 (1980). Some scholars feel that amendments should be limited to correcting "discovered faults in the structure of government. Provisions reflecting only transitory values or momentary responses to particular substantive problems have not been incorporated into the Constitution. By embodying only that which is lasting, the Constitution has remained durable through periods of social, economic, and political change." Note, *The Balanced Budget Amendment: An Inquiry Into Appropriateness*, 96 HARV. L. REV. 1600, 1603 (1983). But the Supreme Court has, of course, never taken the opportunity to invalidate a Congressional amendment measure.

428. ILL. CONST. of 1970, art. XIV, § 2(c).

429. See 2 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 557-58 (1970). This provision was added by amendment to the initial committee proposal on the convention floor in order to prevent "an antagonistic or jealous legislature [from undermining] . . . the significance and clarity of convention amendment proposals by presenting to the voters its own proposed amendments . . . [especially] [i]f its proposed amendments covered the same subjects . . . ." GRATCH & UBIK, *supra* note 168, at 46.

430. GRATCH & UBIK, *supra* note 168, at 46.

431. *Id.*

*valorem* personal property taxes, the legislative proposal was placed on the ballot for the November 1970 election. Anticipating voter approval of the legislative proposal, the convention, in Article IX, section 5(b), provided that any *ad valorem* personal property taxes abolished before the effective date of the new constitution would not be reinstated.<sup>432</sup> Fortunately, both proposals to remove the personal property tax were approved: the General Assembly's amendment repealed the tax as it applied to individuals, and Article IX, section 5(b) of the 1970 Constitution prohibited its reinstatement.<sup>433</sup>

### CONCLUSIONS AND RECOMMENDATIONS

The legal history of state constitutional revision and amendment in Illinois, and perhaps in other states with little if any independent interpretation of their state constitutions, correlates closely with popular attitudes which, throughout most of Illinois's history, have been consistently antagonistic toward fundamental change. This may explain the relative difficulty with which the state constitution can be amended. This constitutional inflexibility in turn encourages a relative lack of growth of independent and expansive state constitutional interpretation. Historically disunified, factious, and individualistic societies breed popular caution in matters of fundamental change; a mistrust of simple majority rule. This popular attitude is reflected in historically rigid constitutions in these states. This rigidity usually results in a low level of judicial independence from the political branches of government. The constitutional perpetuation of political "accountability" to the other branches in the service of social harmony and economic stability makes the judiciary cautious about independent, expansive interpretation of individual rights provisions.

Of course, a conservative approach to state constitutional adjudication in response to the popular reticence on matters of fundamental change might simply suggest principled judicial "democratic accountability." After all, it may be *appropriate* in states like Illinois for the judiciary to avoid experimentation through interpretation and for the legislature to fail to exercise its power to propose meaningful and progressive constitutional measures. This perpetuates the usual role of government in an individualistic political culture —

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432. *Id.*

433. *Id.*

that of referee or neutral manager.

The problem with this posture on the part of public officials, though, is the stifling of public advocacy and debate on issues of fundamental constitutional change that follows from this lack of leadership. Absent *meaningful* opportunities for popular decision-making on issues of government structure or power,<sup>434</sup> or on the relationship between government and its citizens, there is little opportunity to signal the legislature or the judiciary that changes in demographics and political culture now require a more active or different role for government in constitutional growth. Certainly, the mass of Illinois citizens who are neither lobbyists for special interests nor otherwise actively in communication with their legislators will still undergo changes in shared goals, ideals, or attitudes toward government.<sup>435</sup> Thus, to allow for or encourage necessary *growth* of state constitutional law, there must be, at least initially, a sufficient ease and frequency of textual revision,<sup>436</sup> if for no other reason than to provide evidence of popular amenability toward change. A successful effort to bring the flexibility of the Illinois constitution into line with the prevailing national experience and norms would do much to signal the judiciary that there is popular consent to heightened experimentation with expansive constitutional interpretation. Such an effort may have an even greater effect than continual argument before the Illinois Supreme Court about the progressive behavior of other state courts. Otherwise, in the absence of options for reasonable and easy constitutional amendment, and given the continuing failure of reform efforts toward increasing judicial indepen-

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434. There are provisions in the laws for placing "advisory questions of public policy" on the ballot — see 10 ILCS §§ 5/28-9 to -13 (1993) — but these are even more onerous than the limited right to petition for changes in Article IV provided for in Article XIV, § 3 (1970).

435. ELAZAR, *AMERICAN FEDERALISM*, *supra* note 20, at 116:

Under certain circumstances, cultural values change because of changing social status. There is some evidence that, as some people move upward into the middle- to upper-middle-class range, they may adopt at least some of the values of the moralistic political culture. . . . Thus it may be that as parts of Illinois are transformed into suburban areas and settled by people from individualistic culture areas, they also acquire cultural patterns more common to the moralistic political culture.

*Id.*

436. One scholar notes:

[C]learly the inference [of approval or disapproval of existing constitutional compromises] . . . is only valid if certain conditions are met. For an onerous or unfair procedure could thwart amendment long after desire for change became widespread and intense. . . . Hence, use and non-use of the amending power will not really indicate consent unless the procedure is fair and neither too difficult nor too easy.

SUBER, *supra* note 9, at xv.

dence, state courts may be justifiably reluctant to usurp sovereign power and engage in expansive interpretation or "nonformal" amendment.

The Illinois amendatory provisions, however, are even *more* inflexible now than may have originally been intended — even given the need to maintain stability in an unusually contentious and disunified political environment. Minor but important changes in the present process for textual amendment might be a useful initial step toward constitutional growth. By eliminating several burdensome but unnecessary restrictions, like the superfluous "super-majority" requirement for the popular ratification of amendments, the people of Illinois could attempt to stimulate more frequent, desirable structural or policy changes in response to changes in political culture and social aspirations. This sort of effort to amend constitutional text would indicate a turn in popular attitude toward constitutional growth by judicial interpretation as well. One solution might be the imposition of a constitutional scheme of limited, indirect initiative. This advance would not unduly impinge upon the legislative process or negate its virtues. The compromises and careful deliberation that are inherent in the system of representative democracy might even be promoted and enhanced. Otherwise, Illinois public officials are in the unfortunate position of being potentially unaware of the publically-perceived need for fundamental social change, and they will be disinclined to engage in change in any event because the *vehicles* for constitutional change are so rigid that they are not practical. The vehicles for constitutional change (the processes of textual amendment or the attitudes toward judicial interpretation) are not themselves modified because there seems to be no popular inclination toward fundamental change.

Consequently, because of ramifications they hold for the ability of public officials to meet new challenges and for the future development of independent interpretation in state constitutional law, appropriately reasonable and facile procedures for periodic textual alteration and a modern balance between popular and legislative involvement in revision are essential if a constitution and the government and laws it promotes are to remain viable.